#177

ONTARIO
MINISTRY OF LABOUR
JAN 4 1983
HUMAN RIGHTS
COMMISSION

THE ONTARIO HUMAN RIGHTS CODE

R.S.O. 1979, C.318, As amended

IN THE MATTER OF the Complaint of Arny Iancu, formerly of Midland, Ontario now residing in France, that Simcoe County Board of Education, 99 Ferris Lane, Barrie, Ontario and its servants and agents discriminated against him because of his nationality, ancestry and/or place of origin, in contravention of paragraphs 4(1) (b) and/or (g) of the Ontario Human Rights Code, R.S.O. 1979, c.318, as amended (now R.S.O. 1980, c.340)

APPEARANCES:

Ms. Janet Minor,) Counsel for the Ontario Human Rights Commission

J.D. Cockburn, Esq.) Counsel for the Respondent (Simcoe County Board of Education)

A HEARING BEFORE: Peter A. Cumming, appointed a Board of Inquiry in the above matter, by the Minister of Labour, the Honorable Robert Elgie, to hear and decide the complaint.

THE LAW

The Complainant, Arny Iancu, alleges that he was discriminated against in contravention of paragraphs 4(1)(b) and/or (g) of the Ontario Human Rights Code, R.S.O. 1980, c. 340, (hereafter simply "the Code") which reads:

> 4(1) No person shall,
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> (b) dismiss or refuse to employ or to continue to employ any person;
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> ....
>
> (g) discriminate against any employee with regard to any term or condition of employment,
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> because of....nationality, ancestry or place of origin of such person or employee.

The Complainant had been employed by the Respondent, Simcoe County Board of Education, (hereafter simply the "Board") as a teacher in one of its schools. The principal of the school terminated the employment of the Complainant, the power to terminate being within his authority as conferred upon him by the Board. That is, the principal could exercise his discretion in deciding upon whether a probationary teacher should be given permanent status. The principal exercised his power by refusing the Complainant permanent status, in effect, dismissing him from the school Board's employment.

Paragraphs 4(1)(b) and (g) of the Code have been interpreted and applied by many Boards of Inquiry. Given the factual situation suggested by the evidence presented before this Board of Inquiry, two particular issues of law had to be kept in mind, in assessing the evidence and it is useful to

review them before making any findings in respect of the actual evidence.

The first is the issue of "mixed motives", that is, (considered hypothetically at this point) if a Respondent employer terminated the employee's employment for one reason that is valid, say incompetence, but there is also present an unlawful motive, i.e. discrimination contrary to the Code, then is the employer in breach of the Code? The second issue is more difficult and has not received much analysis by previous Boards. Suppose hypothetically that an employee (say a school principal) of an employer (the school board) breaches the Code in dismissing a teacher, but there is no intent on the part of the school board to discriminate[1] then is there liability on the part of the respondent employer for the breach of the Code by its employee? Put in a broader context, this second issue includes a general consideration of the issue of vicarious liability of a respondent employer for a breach of the Code by an employee.

I shall now review the law with respect to these two issues, before considering the actual evidence presented before this Board of Inquiry. In doing so I shall consider both the Ontario Human Rights Code, R.S.O., 1980 c.340 (the "old Code"), which applies to this case, and also the Human Rights Code, 1981, S.O. 1981, c. 53, proclaimed in force June 15, 1982 (the "new Code").

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[1] See Evidence, vol. 1, P. 64, lines 18 to 22; Complaint (Exhibit # 3).

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I. Mixed Motives

Where there are a number of reasons for dismissing an employee, only one of which is a prohibited ground, the presence of that prohibited ground is sufficient to create an offence provided it was a proximate cause of the dismissal.

In R. v. Bushnell Communications Ltd. et al.[1] an employee was dismissed partly because of his inability to get along with his fellow workers and partly because of his union membership. Hughes J. said:

> If the evidence satisfies it beyond a reasonable doubt that membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason or one incidental to it, or as one of the many reasons regardless of priority, s. 110(3) of the Canada Labour Code has been transgressed.[2]

On appeal[3], Evans J. A. upheld the decision of Hughes J., saying, that "to create an offence under s. 110(3) of the Canada Labour Code[4], union membership must be a proximate cause for dismissal, but it may be present with other proximate causes".[4a]

Other Labour Decisions

In The Barrie Examiner[5], the Labour Relations Board found that though the actual reason for the employee's

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[1] (1973), 45 D.L.R. (3d) 218, 14 C.C.C. (2d) 426, 1 O.R.(2d)442.

[2] Id, at D.R. 223

[3] 47 D.L.R. (3d) 668, 18 C.C.C.(2d) 317, 4 O.R.(2d) 288.

[4] R.S.C. 1970, c.L-1.

[4a] At D.L.R. 670.

[5] (1975) O.L.R.B. Rep. 745.

dismissal was a specific incident where the employee had used profane and abusive language towards his employer, there was a general underlying anti-union motive that affected the decision to dismiss. Noting that the burden of proof in the Labour Relations Act is upon the employer to show that union activity was not a motive, the Board said,[1]

> Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts -- first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive.

In Pop Shoppe (Toronto) Limited[2], where the Labour Relations Board found that the reasons for the layoff of an employee included technological changes affecting her job, as well as union activity, it said:

> The Board has long held that in complaints such as this anti-union motivation does not have to be the sole reason or even the predominant reason giving rise to the alleged unlawful activity for the Board to find that the Act has been violated.[3]

After citing Bushnell it said,

> (I)f it is not satisfied that the employer acted without anti-union motive the Board must find in favour of the complainant.[4]

In Re Sheehan and Upper Lakes Shipping Ltd.[5], Urie, J. set aside the Canada Labour Relations Board's finding that the applicant had been refused employment for reasons other than

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1 Id, at 749.

2 [1976] O.L.R.B. Rep. 294.

3 Id, at 297.

4 Id.

5 (1977), 81 D.L.R. (2d) 208 (F.C.A.).

his prior expulsion from unions, a prohibited ground under the Canada Labour Code[1]. He found that it was one of the factors taken into account and it was a proximate cause of the refusal.[2] He said that the proper question to be asked in determining whether subparagraph 184(3)(a)(ii) of the Canada Labour Code has been breached "is not whether such refusals were because the applicant had been expelled, but is whether the expulsions from the unions were motivating factors in the determination not to employ him".[3]

In Blais v. Verreault Navigation Inc.[4], where seasonal employees who were usually laid off in the winter and rehired in the spring were not rehired the spring after they had joined the Seafarers' International Union, the Canada Labour Relations Board found that, although their work performance may have been poor and that that was a valid reason to not rehire them, their joining the Seafarers' International Union was also a factor. It said :

> (T)he Board has come to the conclusion that, in addition to the reasons given by the employer, the fact that these employees were Seafarers' International Union members is, to say the least, an immediate cause of the non-continuation of their employment and of their replacement by other employees.[5]

In Pipher v. Atlantic Bus Lines Inc.[6], where an employer who had recently acquired the business, and who was unaware of the employee's attempts to organize a union, fired him for poor performance and for being late for work, the Labour Relations Board said:

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[1] R.S.C. 1970, c.L-1

[2] Supra, p2, note 5, at 214.

[3] Id. at 212-13.

[4] (1978), 24 D.I. 227 (C.L.R.B.).

[5] Id. at 297.

[6] (1980) C.L.R.B. Rep. 154

> (F)irst, it must be established that the employer knew or believed that the employee was engaged in union activity or support; second, it must be shown that the employer's knowledge or belief in that regard was at least part of the motivation for the discharge of the employee.[1]

Human Rights Decisions

These same principles have been applied in human rights decisions across Canada. If the decision to fire or to refuse to hire, or to refuse to rent accommodations, rested at least in part on a ground prohibited by the human rights legislation the fact that it also rested on non-prohibited grounds does not save the decision from condemnation.

In MacBean v. Village of Plaster Rock[2], four reasons were given for refusing to hire the complainant for the position of clerk-treasurer: she was female, she was too old, she was not a village resident, and she was already employed. The employer wanted to give the job to someone who was unemployed. The Board of Inquiry said that a prohibited reason need only be one of the reasons[3]. It said that the purpose of the Code is to eliminate factors such as age and sex from consideration in decisions affecting employment and that:

> This purpose would not be served if these factors can validly be considered in conjunction with other legitimate factors. Practical considerations reinforce this conclusion. In order to determine whether a prohibited reason was the sole or primary reason for a decision, it would be necessary for the Board to assume the place of the employer making the decision and analyze in full the process, mental and otherwise, which led to his decision. Such an extensive interference with the appropriate internal management functions of an employer cannot have been intended by the legislature, particularly when the declared purpose of the Act can be better accomplished by the much less involved method of determining merely whether a prohibited reason formed part of the reasons for the decision. At the same time, for there to be a violation of the Code, a prohibited reason must actually have affected the decision. If it did not, it is simply not a reason for the decision.[4]

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1 Id. at 156.
2 Nov. 6, 1975 (N.B. - R.W.Kerr).
3 Id. at 5.
4. Id. at 5-6.

Thus, the Board held that once a prohibited reason for the dismissal had been established, it would not look further to see if there were also valid reasons for the dismissal.

In Naugler v. New Brunswick Liquor Corp.[1], the Complainant was dismissed partly because of her poor work performance and because her services as temporary summer help were no longer required, but also because the supervisor did not want women to gain positions of seniority. The Board claimed to follow MacBean and then said it would not decide the case solely on the finding of fact that she was dismissed on a prohibited ground.[2] It said that it would also consider the legitimate grounds for her dismissal because:

> First, the affirmative evidence of discrimination is more related to a general practice than it is to the specific facts of this case. It is possible that the actual decision with respect to the Complainant was based on non-dsicriminatory considerations and that the general practice entered the picture only by way of after the fact rationalization. If this were the case, the decision with respect to the Complainant would not be in violation of the Code, albeit that the explanation offered her for the decision was clearly ill-advised.[3]

This Board may have been taking a different view of general motive than the Labour Relations Board did in The Barrie Examiner, supra, wbere it said that the valid reasons for dismissal cannot even be tainted by an anti-union motive, although perhaps the Board was saying that a prohibited ground was not a proximate cause. The Board continued:

> Secondly, even if the decision to dismiss violated the Code because based in part on sex, other reasons which entered into the decision are relevant to the remedy that should be provided.[4]

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[1] May 25, 1976 (N.B. - R. W. Kerr).

[2] Id. at 14.

[3] Id. at 14-15.

[4] Id. at 15.

In Dunlop v. Calvary Temple Inc.[1], a church organization, which owned a fleet of buses and a service station, dismissed the Complainant from his position as manager of the service station because, the employer alleged, he was insubordinate and had an unco-operative negative attitude. The Board of Inquiry found that religion was also a reason for his dismissal, in that he had failed to attend church and pay tithes. After citing Bushnell, Naugler, and MacBean, the Board said:

> In metaphoric terms, at the very least, the prohibited reason must be like the proverbial straw that broke the camel's back, it must have effected the result. If the camel's back was already broken, then the straw was of no effect and could not be considered relevant.
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> Therefore, notwithstanding the list of other reasons given in the written notice it is necessary to determine if religion played any effective part in the decision to dismiss.[2]

In other words, a prohibited ground must be a proximate cause of the dismissal.

In Bremer v. Board of School Trustees, School District No. 62 (Sooke)[3], the stated ground for denying the Complainant a teaching position was that she had insufficient experience. The suspected ground, though not proved, was the bad publicity surrounding the Premier's dismissal of her husband from a top education post. The Board said:

> (N)othing in the language of the Code required the prohibited consideration to be the "effective cause" and there is ample authority for the proposition that in the absence of express language directing a tribunal or court to find the "sole cause" or the "effective cause", a contravention will occur if the prohibited consideration is only one of the motivating factors.[4]
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> . . .

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[1] Nov. 9, 1978, (N. B. - E. L. Teed).

[2] Id. at 9.

[3] June 10, 1977, (B.C.).

[4] Id. at 13.

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> It is sufficient if the prohibited consideration was a significant reason even though it may be only one of perhaps several factors and even though it may not be the most important factor of the several which together triggered the impugned conduct.[1]

In Segrave v. Zeller's Limited[2], where a man who was recently divorced was refused a position at Zeller's, the Board said , that despite other possible reasons for refusing to hire him for the position of personnel and credit manager, his sex and marital status were not only proximate causes of the refusal but were the major or primary causes.[3]

In Jones and Wilkinson v. Huber[4], a black woman was denied rental accommodation. The Board found that the given reasons, that she was sloppily dressed and that she entered through the back door, were rationalizations after the fact. It said:

> In any event, race is an impermissible factor in an apartment rental decision and cannot be brushed aside because it was not the sole reason for discrimination. So long as it was one of the considerations, it will constitute a violation of the Ontario Human Rights Code.[5]

In Hawkes v. Brown's Ornamental Iron Works[6], the respondents had initially agreed to hire the complainant and then changed their minds just before she was to start work. They believed that because of her age she would be physically unable to handle the welding job. They had no evidence

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[1] Id. at 14.

[2] September 22, 1975, (Ont. -- S. N. Lederman).

[3] Id. at 7-8.

[4] June 29, 1976 (Ont. -- S. N. Lederman).

[5] Id. at 4.

[6] December 12, 1977, (Ont. -- D. A. Soberman).

of her actual physical ability though she did poorly on the tests she was made to perform while in a state of mental anxiety. The Board said, after quoting from Bushnell:

> (I)f 'age was present in the mind' of Mrs. Brown in her refusal to employ Mrs. Hawkes, there has been a violation of the Ontario Human Rights Code, section 4(1)(b), regardless of the fact that other reasons may also have been present.[1]

In Robertson v. Metropolitan Investigation Security Ltd.[2], after citing Bushnell, the Board found , that "the operative and only cause" for not employing the Complainant was that she was a woman and it was the employer's view that a security guard position at a construction site was not suitable for a woman, even though she was fully qualified and willing to do the work[3].

In Gadowsky v. The School Ctee. of the County of Two Hills, No. 21[4], because of declining enrolment in its schools and a tighter budget, the school board had been forced to reduce its teaching staff and did so by laying off the Complainant because she was closest to retirement age : Cawsey, J. upheld the Board of Inquiry decision. After citing Bushnell, he said that her age "was either the main reason for her forced retirement or was incidental to it."[5].

The Board of Inquiry[6] said:

> (T)he question here is whether the matter of the reduction of the elementary staff at Myrnam School was handled in good faith. Clearly, if a prohibited consideration under the Individual Rights Protection Act intruded into the process then it was not.[7]

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1 Id. at 16.

2 August 10, 1979, (Ont. -- P. A. Cumming).

3 Id. at 28.

4 (1980), 1 C.H.R.R. D/184, (Alta. Q. B.),

5 Id. at D/188.

6 August 13, 1979, (Alta., J. P. S. McLaren),

7 Id. at 10.

In Hendry v. Liquor Control Board of Ontario[1], a competent part-time worker who had been laid off because she had been told there was no more work for her found that she had in fact been replaced by another. The Board found that she was an ambitious woman who had wanted to gain a position of more seniority and attributed the personality conflicts between her and her co-workers, the post facto reason for her dismissal, to be at least in part caused by the male worker's stereotyped perceptions of women. The supervisor, rather than trying to resolve the problem, had fired her. The Board of Inquiry said :

> ...(B)eing a woman was a material cause, that is, a proximate cause, one that played a part even if subconsciously and even if "present with other causes" in the decision to terminate her employment.[2]

In Skeete and Samuel v. Jolyn Jewellry Limited[3], the Board of Inquiry enunciated a test, "Would the employee have been dismissed at that time, had the impugned proximate cause not been present?"[4] The Board found that a single incident where the employee had been the subject of a racial slur three months prior to his dismissal was a serious incident but had not played a material role in the decision to fire him. The fact that the firm had a history of hiring many immigrants and of treating workers fairly regardless of colour or race was considered relevant. After finding that the real reasons for the dismissal were strained personal

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1 (1980), 1 C.H.R.R. D/160 (Ontario).

2 Id. at D/162.

3 (1980), 1 C.H.R.R. D/167, (Ont. -- D. A. Soberman).

4 Id. at D/171.

relations, the employee's change in the company's computer operating procedures without informing the company of the details of the changes, and fear on the part of the company that he might quit and leave them "in the lurch", the Board said: "It follows that Mr. Skeete, would very likely have been dismissed if he had been a white person in the same circumstances and on the same occasion." [1a]

In Reid v. Russelsteel Ltd.[1] after discussing mixed motive cases in a long footnote[2], the Board found that the fact that the Complainant was a black Jamaican had not been a reason for her dismissal though the manner of her dismissal from a simple employer-employee relations standpoint "left much to be desired".[3]

In O'Brien v. Ontario Hydro[4] where Hydro refused to hire the Complainant as an apprentice electrician because he was too old (at 40), he was overqualified, and he had an unstable work history, the Board canvassed the Canadian and some American law on the point and said :

> Indeed, if one were to summarize the Canadian decisions on age discrimination, it could be fairly said that if a board of inquiry finds that a respondent allowed a Complainant's age to influence whatsoever his or her treatment of the Complainant, notwithstanding any other factors, then discrimination has, in fact, occurred ... The essential issue, in considering the evidence in an Inquiry such as this, is to determine whether 'age' is or is not an operative factor by itself in the refusal to employ. (emphasis h

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1a. Id.

[1] (1981), 2 C.H.R.R. D/400, (Ont. -- P. A. Cumming).

[2] Id. at D/400.

[3] Id. at D/401.

[4] (1981), 2 C.H.R.R. D/504, (Ont. -- P. A. Cumming).

[5] Id. at D/508.

In Mitchell v. Nobilium Products Limited[1], the Board said, "I am satisfied that the primary reason for the Complainant's dismissal was, in fact, unsatisfactory work performance."[2] However, it also found that of the six employees who had been with the company for a long time and whose work performance was poor, the four employees of Greek ancestry were redeployed in another part of the company's operations while the two employees who were black were dismissed. It said that:

> ... it is not sufficient to rebut an inference of discrimination that the respondent is able to suggest just any rational alternative explanation. The respondent must offer an explanation which is credible on all the evidence.[3]

To sum up, if one of the reasons for dismissing the employee, or refusing to hire a person, or refusing to rent accommodation to a person, is a reason prohibited by the Human Rights Code, the Code has been violated regardless of any other reasons for that act. However, the fact that there were also other valid reasons may affect the remedy that is awarded.

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[1] (1982), 3 C.H.R.R. D/641, (Ont. -- R. W. Kerr).

[2] Id. at D/642.

[3] Id.

II. The Issue of Vicarious Liability of a Respondent Employer for a Breach of the Code by an Employee

In considering this topic, I shall first review the common law generally with respect to 'vicarious liability', and then consider the question at hand, that of 'vicarious liability' in respect of a breach of the Code. The matter shall be considered in the context of both the Ontario Human Rights Code, Revised Statutes of Ontario, 1980, c. 340 (the "old Code) and the Human Rights Code, 1981, Statutes of Ontario 1981, c. 53, proclaimed in force June 15, 1982 (the "new Code").

1. The Nature of Vicarious Liability

Professor Atiyah, in his text, Vicarious Liability in the Law of Torts[1] neatly sets forth the lines of distinction between vicarious liability and personal liability.[2]

> "Vicarious liability in the law of tort may be defined as a liability imposed by the law upon a person as a result of (1) a tortious act or omission by another, (2) some relationship between the actual tortfeasor and the defendant whom it is sought to make liable, and (3) some connection between the tortious act or omission and that relationship. In the modern law there are three and only three relationships which satisfy the second requirement of vicarious liability, namely that of master and servant, that of principal and agent, and that of employer and independent contractor. There is, however, an important difference between the first, and the other two of these relationships, since only in the case of master and servant is there any general rule imposing liability in all circumstances, whereas in the other two types of relationship, vicarious liability exists in particular situations only, and not as a general principle. In all three cases, on the other hand, the third condition of vicarious liability is required, namely some connection between the tortious act or omission and the relationship between the actual tortfeasor and the person

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1 London, Butterworths, 1967.

2 At p. 3.

> sued. In the case of master and servant, this third requirement is expressed in the formula that the tort must have been committed in the servant's "course of employment". It will be submitted later that in this respect the law is the same in all three cases.
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> In legal theory, vicarious liability is readily distinguishable from personal liability. There is generally an obvious difference between holding a person liable for his own torts and holding him liable for the torts of a servant, agent or independent contractor, and the difference is emphasised by the fact that in the modern law of torts liability is still generally based on some notion of "fault". A person is not, subject to well-known exceptions, generally liable in tort except where he has intentionally or negligently caused some loss or damage to the plaintiff. But the result of vicarious liability is to make one person compensate another for loss not due to his fault at all, although it may be due to the fault of his servant, agent, or independent contractor."

2. Vicarious Liability in Tort

For a master to be liable for the tortious acts of his servant, the master must be able to control the manner in which the servant performs the work he is authorized by the master to perform.

In T. G. Bright v. Kerr[1], where the delivery man was found negligent in causing a traffic accident, Duff, C. J. C. said:

> The principal having the power of choice has selected the agent to perform in his place a class or classes of acts, and ... it is not unjust that he who has selected him and will have the benefit of his services if efficiently performed should bear the risk of his negligence in "matters incidental to the doing of the acts, the performance of which has been entrusted to him."[2]

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[1] (1939) SCR 63.

[2] At 70.

On the particular facts of that case the company was not found to be vicariously liable because it could not have controlled the delivery man's manner of driving had it wanted to. Here, the school Board benefits by being able to delegate responsibility for hiring and firing of teachers to school principals and can direct its principals with respect to the manner in which they are to perform these duties.

More directly on point, where a principal (or master) authorizes his agent (or servant) to perform a certain function but gives the agent (or servant) discretion as to the mode of performing it, the principal (or master) is vicariously liable where the function is performed improperly. A school principal is a servant (rather than an agent) of the school board, but the law is the same on this point whether or not the principal is a servant or mere agent. In Sheppard Publishing Co. Ltd. v. Press Publishing Co. Ltd.[1], the defendant was found vicariously liable when, without its knowledge its sales agent made misrepresentations about the plaintiff in order to get the plaintiff's customers to buy from the defendant. In W.W. Sales Ltd., v. Edmonton[2], the defendant was found vicariously liable where it had authorized its servants to clean away rubbish without telling them how to do it and they started a fire which caused damage to the plaintiff's premises. In both cases, the agent or servant has performed acts he was authorized to do but had performed them in an unauthorized manner, and for that the employer was held liable. If a school board were to give its school principal full authority to hire and fire teachers without instructing him as to the proper grounds for doing so, it could be found vicariously liable if he does so for improper grounds.

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1 (1905), 10 OLR 243 (CA).
2 (1942) SCR 467.

3. Vicarious Liability in Human Rights Cases

In Oram and McLaren v. Pho[1], where the complainants were refused service in a bar by the barmaid, a B.C. Board of Inwuiry discussed whether the owner of the bar could be held vicariously liable for the barmaid's discriminatory conduct. The Board said that if the requirement was that the owner must be found to have personally contravened the Code before the owner could be held liable, this

> ...would provide a convenient loophole through which the owners and managers of public houses and other establishments which offer services or facilities customarily available to the public could escape responsibility for violations of the Code by having an agent or servant effect the denial and enforcing the discriminatory policy rather than doing so personally. Fortunately, the common law of this country is not so short-sighted. The law provides that a master is responsible for the wrongful act done by his servant in the course of his employment.[2]

The Board then quoted from Salmond on Torts and several tort cases. The Board found[3] that the owner had delegated to the barmaid full responsibility for operating the bar and that this was sufficient evidence with which to attach full responsibility for her discriminatory acts to the owner. The Board, however, also went on to find[4] that the owner had, on the day in question, upheld the decision of the barmaid to refuse to serve the complainants. The owner, thereby, personally and directly committed a violation of the Code.

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1 August 8, 1975, (B. C. - J. Wood).

2 Id, at 24.

3 Id, at 29.

4 Id, at 30.

In Re Nelson et al. and Gubbins et al., [1] Taylor, J. held that a master is not vicariously liable for its servant's discriminatory conduct constituting a breach of the Human Rights Code of British Columbia. The Board of Inquiry had found on the facts that the conduct of the rental agent, Mrs. Gubbins, when she refused to rent a housing unit to Native Indians had not been directed, condoned or adopted by the management corporation of the townhouse complex, Byron Price. The Board had found that the management corporation was not itself in breach of the Code and had found it liable solely on the basis that its servant[2] was in breach of the Code. Taylor, J. reversed the Board's decision, pointing out that paragraph 17 (2) (c) of the B. C. Code only allows the Board to make orders for the payment of aggravated damages against "the person who contravened the Act" and cannot be read to allow orders to be made against other persons on the basis of vicarious liability. As Byron Price did not personally contravene the Code it could not be held liable. Craig, J. A., dismissing the appeal[3], said[4]:

> The prime issue is, therefore, whether the respondent as an employer is vicariously liable for Mrs. Gubbins' contravention of the Code. Counsel for the appellant (complainant) submits that the legislation is remedial and to ensure this result a Court should hold that an employer is vicariously liable for contravention by an employee otherwise an "employer may 'benefit' from discriminatory policies, but avoid responsibility for such acts by laying the blame at the hands of its employee". Counsel for the appellant submits that an order against

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1 (1980) 106 DLR (3d) 486, 17 BCLR 259 (BCSC).

2 Taylor, J. resolved the preliminary dispute as to whether Mrs. Gubbins was Byron Price's servant by finding that she was because, although her wages were not paid by Byron Price, she was under its supervision and control. It directed her as to how she was to carry out her job.

3 Re Nelson et al. and Byron Price & Associates Ltd. (1981), 122 DLR (3d) 340 (BCCA).

4 At 346-7.

an employee under the provisions of s. 17 (2) would, in many cases, be negatory because, generally, only an employer could comply with any of the orders which may be made under s. 17(2), particularly orders under paras. (a) (b) and (c).

I have no doubt that the legislation is remedial and that in accordance with s. 8 of our Interpretation Act, R. S. B. C. 1979, c. 206, it should be given such "fair, large and liberal interpretation as best ensures the attainment of its objects", but I have no doubt, also, that in striving for this interpretation a court should not ascribe a meaning to words in the legislation which would normally be inconsistent with the grammatical and ordinary sense of thewords used in the Act as a whole. I think that there is much to be said for the view that an employer should bear responsibility, in some form, for discriminatory conduct of an employee in the course of his employment but that is a decision for the Legislature, not for a Court. Our sole concern is whether s. 17 of the Human Rights Code provides for vicarious liability. The operative phrase throughout s. 17 is "person who contravened this Act". In this case, the only conclusion is that the Board found that the respondent did not contravene the Act. Notwithstanding this finding, the board concluded that the respondent was "vicariously liable" for the contraventions of Mrs. Gubbins. While this result may be desirable, it cannot, in my opinion, be inferred from the legislation. To find the respondent "vicariously liable" would require reading words into the statute which are, in my opinion, not justified. As I have said, the operative words in s. 17(2) are "person who contravened this Act". The board may order the person to pay aggravated damages under s. 17(2)(c) only if a person contravenes the Act "knowingly or with a wanton disregard" - that is, if he personally contravenes the Act. The Board found that the respondent did not personally contravene the Act. It could not, therefore, make an order that the respondent pay "aggravated damages".

. . .

(I)n my opinion, reading the words of the statute in their context and in their ordinary and grammatical sense it cannot be said that the respondent is vicariously liable. If the Legislature had intended that an individual in the position of the respondent should be amenable to any of the orders which may be made under s. 17,

> it would have been a simple matter for the Legislature to have enacted words to the effect that any employer whose servant contravened the Act in the course of his employment would be deemed to have contravened the Act. The Legislature has not done so either expressly or impliedly.

Craig, J. A. also said[1]:

> If I were satisfied that the board had found as fact that the respondent had "authorized, condoned, adopted and ratified the discriminatory conduct of Mrs. Gubbins, I would say that the board was correct, in law, in making an order against the respondent under s. 17(2)(c) because, on the basis of that finding the Board could conclude that the respondent had, in effect, personally contravened the Act. I think, however, that the board did not make this finding of fact. On the contrary, I think that the board proceeded on the premise that the liability of the respondent was vicarious, not personal.

Section 19(b) of the Ontario Human Rights Code also only allows the board to make orders against "any party who has contravened this Act". Thus, on the reasoning of the Nelson case a school board could not be held vicariously liable for a school principal's firing of a teacher on grounds that constituted unlawful discrimination.

In Hartling v. Timmins Board of Police Commissioners[2]. the Board of Police Commissioners was found liable for the Police Chief's discriminatory hiring practices. However, that case can be distinguished from the Nelson case, supra, because the Board of Police Commissioners was found not to be innocent of the Chief's practices. The Board of Inquiry (myself) found on the facts[3] that the Board of Police Commissioners knew or ought to have know that the Chief was discriminating against women and that it did not try to deal effectively with the problem.

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1 At 345.

2 (1981), 2CHRR D/487.

3 At D/493.

Its liability was held to be personal.[1] It was held liable because, in authorizing the Chief to recruit on its behalf, it "did not really set up, or enforce, a rigorous system for recruitment with objective standards, but rather left hiring largely to the subjective evaluation of the Chief". Also, it was held personally liable because it "knew, or most certainly should have known if it had performed its responsibilities with reasonable diligence, that Chief Schwantz was in breach of the Code in his recruitment practices". Thus, the Board of Inquiry found that, because the Board Police Commissioners knew the Code was being breached and because it did not actively do anything to ensure compliance with the Code, it condoned the practices of the Chief. In Nelson, supra, Craig, J. A. said that the master could be found personally liable if it condoned the discriminatory actions of its servant.

In Simms v. Ford Motor Company of Canada[2], the Board of Inqiury (H. Kreever) stated obiter,[3] that if an employer stood by idly in the knowledge that his employees were using racially abusive language against a fellow employee in a manner that amounted to discrimination with regard to a condition of employment, the employer would be held liable for breach of the Code. The Board went on to say[4] that:

> ... where an employer has adopted a policy against discriminatory treatment of, or language against, any employee and is unaware, and has no reason to believe that those instructions are being disobeyed, it is inconceivable to me that the employer automatically becomes guilty of a violation of Section 4 of the Code.

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1 At D/494.
2 (June 4, 1970).
3 At p. 16.
4 At p. 17.

The Board suggested[1] that the mere announcement of a policy against discriminatory conduct may be insufficient. The Board in Hartling, supra[2] said that the passing of a "Hiring Policy" resolution was not sufficient.

These cases suggest that the employer is liable for breach of the Code if it knows of its employee's breaches but does nothing to prevent them or remedy them. The employer has a defence if it acts with due diligence once it knows of the breach of the Code.

In Bell and Korcyak v. Ladas and the Flaming Steer Steak House[3], a sexual harassment case, the Board of Inquiry (O. B. Shime, Q. C.) stated obiter[4] that:

> The law is quite clear that companies are liable where members of management, no matter what their rank, engage in other forms of discriminatory activity. Thus, companies have been held liable where lower ranking members of the management team engage in anti-union activity or discrimnate against employees because of race or colour, and the same general law that imposes liability in those cases ought to apply where members of the management team discriminate because of sex. Thus, I would have no hesitation in finding the corporate respondent liable for a violation of the Code if one of its officers engaged in prohibited conduct and, indeed, the same liability would attach if the violator had a lower rank on the management team. (emphasis his)

No cases were cited in support of this statement of the law. On the facts of that case, the manager who was alleged to have committed the acts of sexual harassment was also the owner and officer of the corporation. Although not mentioned in the case, his acts would have been the acts of the corporation under the organic theory of corporate criminal responsibility (discussed infra) and the corporation might have, there

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1 At p. 17.
2 At p. D/493.
3 (1980), 1 CHRR, D/155.
4 At D/156.

been found personally liable for any breaches of the Code that he, as its directing mind and will, committed.

The Organic Theory of Corporate Responsibility

A factual situation similar to Bell arose in a recent Board of Inquiry, Cowell and Cox v. Gadhoke and Super Great Submarine et al.[1] where the sole shareholder and sole director of the respondent corporation was found to be in breach of the Code[2], having committed acts of sexual harassment. I held that in such a situation, under the organic theory of corporate responsibility, that the corporate respondent was itself in breach of the Code.

> "...(T)he corporate Respondent, in reality, was the alter ego of the individual Respondent. As Mr. Gadhoke was the directing mind of the corporate Respondent, it is clear that as a matter of corporate law, the corporation is responsible to the Complainants.[3]

It is necessary to briefly review the evolution of the organic theory of corporate responsibility. The cornerstone of general corporate law consists of the fundamental attribute of corporate personality being that the corporation is a legal entity entirely distinct and separate from its shareholders.[4] That is, the corporate entity is a separate, legal personality, albeit an artificial person, capable of enjoying rights and duties just like a natural person.

The common law has evolved a wide doctrine of both agency and vicarious liability. Just as a natural person can be bound by the acts of his or her agent, so can a corporation. A contract, if

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1 (Ont. - Sept. 28, 1981, P. A. Cumming).
2 At p. 33.
3 At p. 34.
4 Salomon v. Salomon & Co. (1897(A. C. 22.

the agent has real or apparent authority, is a contract between the third party and the agent's principal. In tort, as we have seen supra, if the relationship between the principal and agent amounts to a master-servant relationship and the servant is tortious in the course of his employment (e.g. negligently driving a delivery truck) there is liability on the part of the master on a vicarious liability basis.

However, in respect of some tortious situations the law did not allow for vicarious liability, but rather insisted upon personal fault being present on the part of the master as a prerequisite to liability. That is, the master himself had to be personally at fault to be liable.

The famous Lennard's[1] case is illustrative of the problem. The corporation owned a ship that was unseaworthy. Section 502 of the British Merchant's Shipping Act[2] provided for an exemption from vicarious liability on the part of the owner of the ship in certain situations, if there was no fault on his part. That is, the statute cut back upon the normal vicarious liability. The managing director was at fault in having an unseaworthy ship and this fault gave rise to the loss in question.

The issue was whether the shipowner corporation was liable notwithstanding the statutory requirement that the owner of a ship was liable for its unseaworthiness only if personal fault could be attributed to the owner.

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1 Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd., (1915) A. C. 705.

2 1894 (57 & 58 Vict. c. 60).

The court held that the managing director was not merely a servant for the corporation in respect of whom the corporation could be liable for torts only upon a vicarious liability basis. If so, because of the statutory exemption for vicarious liability, there would be no liability. Rather, the court held that the managing director was someone for whom the corporation was liable because the managing director's actions were the very actions of the corporation itself. This might be otherwise expressed as saying that the managing director was the 'directing mind' of the corporation.

The decision extended the liability at common law of a corporation beyond that flowing from a normal master-servant relationship upon a vicarious liability basis. The corporation itself was a tortfeasor, as was the managing director, Lennard. The actions of the corporation are the actions of its directing mind.

A similar problem arises when the agent commits an intentional tort. For example, a managing director or a corporation causes a fraud to be perpetuated in the course of carrying on its business. The problem in this regard, if the corporation is the master, is that it is difficult to say that the corporation can be personally at fault, it being an artificial personality rather than a real person. Therefore, if one takes a strictly logical approach in this regard, the corporation can only act through its officials and therefore it could not be liable, not having any personal fault itself. However, stemming from Lord Haldane's judgment in the Lennard's case, the courts have elected to treat the acts of certain corporate officials as those of the corporation itself and therefore

attribute personal fault to the corporation. This is sometimes known as the "organic theory". The fault is attributed to the corporation as an extension, or a growth, of those running the corporation's affairs. It is emphasized that this is not liability arising from agency law through a master-servant relationship with vicarious liability. Rather, the acts of the agent are treated as though those of the principal itself and therefore the corporation is liable on its own account for those acts. It is not liable upon a vicarious liability basis.

A distinction must be drawn between managing directors and the like whose intentions are attributed to the corporation itself, and simply subordinate employees who are mere servants.

Lord Haldane's principle in Lennard's case has been extended to, and exercised a powerful influence in, criminal law.

Historically, as a matter of common law, there was generally no vicarious liability in respect of a crime. To constitute a crime there was need for mens rea (criminal intent or guilty mind). In more modern times statutory offences were created by the legislture which dispensed with mens rea and imposed vicarious liability upon the master for the crimes of the servant. Therefore, if the master was a corporation, there was no good reason why the master (corporation) should not be held liable even though it was a corporation. This was the first development in making corporations criminally liable, but obviously a statutory basis was required.

However, from the approach taken by the courts, in particular Lennard's case, certain officials' actions gave rise to liability on the part of the corporation. Therefore, even though mens rea might be an essential element of a criminal offence, the knowledge, belief or intention of the managing directors or officers, i.e. the directing mind of the corporation, is considered by the courts to be that of the corporation. That is, the actions and intentions of certain officials are attributed to the corporation. They are not simply servants of it. The corporation itself is considered to have committed the crime.

In R. v. St. Lawrence Corp.[1], it was held that a corporation can have more than one alter ego. Large corporations have directing minds and wills in their various departments and in their branch offices. In that case the vice-president in charge of sales was found to be part of the directing mind. Schroeder, J. A., held that the corporation is not responsible for the criminal acts of its servants or agents under the doctrine of vicarious liability.[2]

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1 (1969) 2 O. R. 305 (C. A.).

2 Recently Canadian Courts seem to have been moving towards a doctrine of criminal vicarious liability. In R. v. Waterloo Mercury Sales Ltd. (1975), 18 C. C. C. (2d) 248 (Alta. D. C.), the corporate defendant was convicted of fraud when its used car sales manager had, unknown to the directors and officers and contrary to their written instructions, turned back the car odometers prior to sale. The court found that, although the used car sales manager was not a director or officer of the corporation, he had been delegated the full responsibility for the buying (except that he could not sign cheques), repairing and selling of used cars. He was found to be the directing mind and will of the corporation in the sphere of used car sales.

In R. v. P. G. Marketplace (1980), 51 C.C.C. (2d) 185 (B.C.C.A.), the corporate defendant was found guilty of fraud where, unknown to the director a salesman defrauded a customer. The court held that where there is a clear delegation of authority to a servant, that servant is the directing mind and will of the corporation in the sphere of his authority. This is very similar to the doctrine of vicarious liability whereby a corporation is liable for the tortious acts committed by a servant within the scope of his authority. The only difference between the organic theory of criminal liability and the tort doctrine of vicarious liability seems to be that, under the former, the servant's acts must be within the scope of his actual authority while, under the latter, the servant's acts must be within the scope of his actual or ostensible authority.

The organic theory is also seen to be applied in income tax law. Every person resident in Canada is liable for federal income tax by s. 2(1) of the Income Tax Act, S. C. 1970-71-72, c. 63, but there is no definition as to what is meant by "resident". The case law has held that for a coporation, residence is where some part of the central control and management (or directing mind) of the corporation actually abides[1].

In my opinion, the organic theory of coporate responsibility applies in respect of breaches of the Ontario Human Rights Code. If an individual is in breach of the Code, and the breach arises in the course of the individual acting as agent for the corporation in the carrying on of its business, and the individual is also the (or at least part of the) 'directing mind' of the corporation, then the corporation itself is in breach of the Code. Cowell and Cox v. Gadhoke exemplifies an application of this view of the law, in the finding that the corporate respondent was in breach of the Code, given the finding that the individual who was the sole shareholder, principal officer, and sole or main director, was himself in breach of the Code because of sexual harassment in the course of carrying on the corporate respondent's business.

5. A Continuation of a Consideration of Vicarious Liability in Human Rights Cases.

There are two cases where the employer may have been found liable, simply on a doctrine of vicarious liability, but neither case specifically referred to the doctrine. In Fuller v. Candus Plastics

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[1] Unit Construction Co. Ltd. v. Bullock (1959) 3 All E. R. 831; (1960) A. C. 351 (H.L.).

Limited[1], the Board of Inquiry (R. W. Kerr) found the company liable where its foreman, to whom it had given nearly complete discretion in personnel decisions after initial hiring, dismissed an employee on the grounds of race, colour, and place of origin (among other reasons). In Morgan v. Toronto General Hospital[2], the Board of Inquiry (W. S. Tarnopolsky) found that the complainant had been denied employment by reason of place of origin, race and ancestry by the personnel manager. The Board said[3], that:

> ... since he was clearly authorized by the Toronto General Hospital to make the initial decisions as to whether a person shall pass on to the Department concerned for a further interview, the refusal "to refer or to recruit", contrary to section 4(1)(a) of the Ontario Human Rights Code, was that of the Hospital.

Even though the Hospital was found[4] to be "not racist" and to be, at least in some hospital departments, an "equal oppportunity employer", it was held liable for the discriminatory acts of its personnel manager.

6. Vicarious Liability at Common Law for Breach of the Old Code

In the Nelson case, supra, Taylor, J. suggested obiter[5], that the common law gives a right to sue the employer of a person who breaches the Code, "if the breach was committed during the course, and within the scope, of performance by a servant of duties of service" but that the Board of Inquiry did not have jurisdiction to grant common law

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1 (1981), 2 CHRR D/419.
2 October 14, 1977.
3 At 29.
4 At 17.
5 At DLR 492 and BCLR 265.

relief. However, in Board of Governors of Seneca College v. Bhadauria[1], Laskin, C. J. C. held[2] that a complainant cannot sue in the courts for a breach of the Ontario Human Rights Code because the Code is comprehensive in its administrative and adjudicative features. The complainant must follow the procedure set out in the Code to redress the wrong. In that case, the complainant had alleged that she was denied employment on prohibited grounds. Laskin, C. J. C. also held[3] that refusal to employ, on any grounds, has never been recognized as giving rise to any liability in tort for discriminatory conduct.

7. Agency Law and the Responsibility of a Principal for his Agent's Contractual Acts.

However, this may not totally preclude a teacher from suing his school board for the discriminatory act of a school principal. An action for wrongful dismissal sounds in contract, not tort. Dismissal on the grounds of race would not be for "just cause". The school principal has actual authority both to enter into and to rescind contracts of employment with teachers on behalf of the school board. Therefore, under agency law, the school board would be liable for a principal's breach of contract. Although a Board of Inquiry could not entertain an action for breach of contract, on this reasoning the school board might be found liable, not vicariously, but rather on the grounds that it personally, through its agent, breached the Code. After all, the contractual acts of an agent within the agent's actual and apparent authority are deemed to be the acts of the principal. The action by an agent of breaching any employment contract between his

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1 (1981), 124 DLR (2d) (SCC).
2 At 195.
3 At 200.

principal and a third party through unlawfully (by reason of a prohibited ground under the Code) terminating the employment contract, is the act of the principal. The principal is considered at agency law to be the person who does the act, which act contravenes the Code. Thus, it is the principal (a school board employer in our type of situation) who would be a party in contravention of the Code, for a breach of an employment contract by its agent, a school principal.

8. Vicarious Liability and the New Code

Subsection 40(1) allows a Board of Inquiry to make an order against a respondent party, providing a remedy to a complainant, where the right of the complainant under Part I of the new Code has been infringed in "contravention of section 8". Paragraph 19(b) of the old Code, provides that a Board may make an order against any "party who has contravened this Act". Such a provision was interpreted by the B. C. courts in Nelson to mean that a party against whom an order is directed must personally contravene the legislation.

In my opinion, both the old Code and new Code are saying in the quoted provisions, substantively the same thing, being the obvious requirement that a party must contravene the Code before an order can be made against him. Subsection 40(1) of the new Code does not expand upon the former paragraph 19(b) of the old Code in so far as resolving the question as to whether an employer must be personally in breach of the Code to have contravened the legislation, or whether there can be a contravention on a vicarious liability basis. To answer this, one must look to other provisions of the new Code.

Part I of the new Code sets forth the basic human rights, including,

> 4. - (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status or handicap.
>
> 9. 1 (c) "equal" means subject to all requirements, qualifications, and considerations that are not a prohibited ground of discrimination.

Section 8, the concluding provision to Part I, provides that:

> No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

Part II provides further, for constructive discrimination.

> s. 10 A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances; or
>
> (b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right.

I discussed these provisions at length in my recent decision as a Board of Inquiry in Morley Rand et al. v. Sealy Eastern Limited, Upholstery Division (June 14, 1982).

The new Code is clear, in my opinion, in not requiring intent to discriminate, this being set forth expressly by legislative provision in section 10, and being the position arrived at in the case law as reviewed in Rand in the evolving interpretation of the old Code, until the recent Ontario Divisional Court decision in Ontario Human Rights Commission v. Simpson Sears[1].

As well, section 10 of the new Code refers to any situation identified by a "prohibited ground", and thus makes clear that a respondent who has enacted a neutral employment condition which has a discriminatory result, may successfully defend by establishing that "the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances". That is, unlike subsection 4(6) of the old Code, the defence is not (reading subsection 4(6) of the old Code, simply in a literal sense) limited to situations where "age, sex or marital status" are the prohibited grounds. Thus, section 10 of the new Code expressly extends the defence generally, being that position reached by the evolution of the case law[2] in interpreting the old Code.

Finally, it seems clearly implicit to section 10 of the new Code that the onus falls upon the employer to bring himself within the exceptional situation constituting a defence, also being that approach reached by the evolution of the case law under the old Code.

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1 (1982), 36 D. R. (2d) 59 (Div. Ct.); affirmed Ont. C.A.; appeal pending to the Supreme Court of Canada.

2 Until the Simpson-Sears decision: see note 1.

As discussed in Rand, paragraph 10 (a) of the new Code provides the employer with a defence "where . . . the requirement . . . is reasonable . . . in the circumstances." The stated legislated standard is "reasonable". My own interpretation of this provision is that an employer who could establish that the employment requirement was reasonable in terms of the needs of his business (for example, a store that was open on Saturdays) would have to go further and establish as well, that he could not reasonably accommodate a particular employee whose creed prevented him or her from working on Saturdays.

That is, the "reasonable . . . in the circumstances" standard of section 10 of the new Code embraces two facets - the employer must show not only that there is an objective real need (it is "reasonable") for the general employment requirement that constructively discriminates against the particular employee, but also that this need of the employer cannot be met (in the circumstances, it is not "reasonable" to be able to do so) by an accommodation of the particular employee. (Alternatively, the employer would have a successful defence if he could show that while reasonable accommodation was possible, it was offered and refused).

Subsection 4(1) of the new Code is more concise than subsection 4(1) of the old Code. The term "equal treatment" encompasses several forms of discrimination on prohibited grounds, for example, refusal to hire, refusal to refer, refusal to recruit, discrimination in a condition of employment, or maintenance of separate lines of progression.

Bearing in mind that human rights legislation must be interpreted liberally, it seems clear that 'unequal treatment' may include a refusal to accommodate. 'Unequal treatment' need not be direct (section 8) and therefore, a general employment condition which may be intended to be neutral may "indirectly" result in 'unequal treatment'. Section 10 is, of course, even more explicit regarding the issue of intent, and clearly, intent to discriminate is not a prerequisite to a finding of discrimination. Furthermore, the requirement that a respondent attempt, if reasonably possible, to accommodate a complainant's religious practices flows very naturally from an interpretation of section 10.

The "reasonable and bona fide" clause is an exception to the general rule of section 10. Therefore, once a complainant makes out a prima facie case of discrimination because a seemingly neutral condition results in unequal treatment, the onus is upon the respondent to show that the condition was "reasonable and bona fide."

Subsections 22(1) and (2) deal with discriminatory employment advertising and applications for employment.

> 22. - (1) The right under section 4 to equal treatment with respect to employment is infringed where an invitation to apply for employment or an advertisement in connection with employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.
>
> - (2) The right under section 4 to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination. (emphasis added).

These subsections also cover such situations where a complainant is required to meet certain qualifications that conflict with the complainant's religious tenets, such as, for example, working on the sabbath. Thus, an offending employment qualification, such as the stipulation that applicants must be clean shaven, in the advertisement or application form, would constitute discrimination with respect to the applicant's right under section 4.

Reading all of the above provisions of the new Code together, they obviously afford a broad, and clear, basis of protection to persons from discrimination on prohibited grounds. I have discussed briefly the meaning of these provisions as I interpret them. The further question then is - do these provisions also mean that an employer can be 'vicariously liable' for the personal contravention of the new Code by an employee? Or, putting it another way, is there an infringement of the right of a complainant in "contravention of section 8" by a party to a proceeding, in a situation where it personally has not contravened the Code, but whose servant has (in the hypothetical context)?

From my review of the law, it seems to me that an employer would be personally in breach of the new Code in the following types of situations (and I shall use as examples previous decisions in respect of the old Code by myself, constituted as Boards of Inquiry).

(1) Where the employer himself, by his own personal action, directly or indirectly, infringes a protected right, then he has, of course, contravened section 8. (For example, where an unincorporated,

sole proprietorship refuses to employ on a prohibited ground; or where an unincorporated landlord discriminates against a complainant in the occupancy of a commercial unit on a prohibited ground - Blake v. Laconte - Ont., March 1980)

(2) Where the employer does not intend to discriminate, but there is constructive discrimination, then the employer is in contravention of sections 10 and 8 of the new Code (for example, by a neutral employment requirement or qualification that knowlingly results in the exclusion of women, and the requirement or qualification is not a reasonable and bona fide one in the circumstances - Ann J. Colfer v. Ottawa Board of Commissioners of Police and Ottawa Police Chief Leo J. Seguin (Ont. Jan. 13, 1979).

(3) Where the employer himself takes no direct action of discrimination, but authorizes, condones, adopts, or ratifies an employee's discrimination, then the employer is himself personally liable for contravening the Code (whether on a basis of contravening section 8, or section 10 coupled with section 8) as it is the employer himself who has infringed or done, directly or indirectly, an act, "that infringes a right under this Part" (section 8). Section 8 says "No person shall infringe or do . . . anything that infringes a right . . ." The employer is infringing or doing something by its mere passive inaction of allowing an infringement of a right in the workplace when the employer could rectify the situation. To do nothing can be, in the circumstances, to "do" something that "infringes a right" within the meaning of section 8. (For example, the Hartling decision, referred to supra; or S. S. Dhillon v. F. W. Woolworth Company Limited (Ont., Feb. 12, 1982)

where the management in a warehouse "knew, or should as reasonable men acting as management have known, that there was regular, and significant verbal racial harassment" and "did not take reasonable steps to put an end, or at least minimize, the racial abuse." (p. 66))

(4) Where the employer is a corporate entity, and an employee is in contravention of the Code, and that employee is part of the 'directing mind' of the corporation, then the employer corporation is itself personally in contravention of the Code. The act of the employee becomes the act of the corporate entity itself, in accordance with the organic theory of corporate responsibility. (For example, in Gadhoke, supra, where the sole managerial employee was guilty of sexual harassment, then the employer corporation was itself personally committing the act of sexual harassment. While they were not necessary facts to the result, in that case the individual respondent was not only the sole manager, but also was the owner (shareholder), a corporate officer, and corporate director. Any one of these factors, coupled with the improper act coming in the course of carrying on the corporation's business, would have rendered the corporation in personal contravention of the new Code).

(5) The difficulty in applying the organic theory of corporate responsibility (as referred to in #4) comes in the factual determination as to whether the employee in question is part of the 'directing mind'. Gadhoke illustrates the obvious case - the individual respondent was the sole manager, the owner, corporate officer and corporate director. Other situations as not as easy. It seems to me that, generally speaking, whenever an employee provides some function of

management, that he is then part of the 'directing mind'. (Thus, in the Ontario decisions of Fuller, supra - where a foreman had nearly complete discretion in personnel decisions - and in Morgan, supra - where a personnel manager had the discretionary authority to pass on an employment application for further consideration - one could say, I think, that the employees where performing a function as part of the 'directing mind', and the decisions could be rationalized on that basis. Thus, I would take a broad view of the range of factual situations which are embraced within the concept of 'directing mind'. Once an employee is part of the directing mind, and the contravention of the Code comes in his performing his corporate function, the corporation is itself also personally in breach of the Code.

(6) Where an employee unlawfully (ie. in contravention of the Code) causes the breach of a contract between his employer (the employee-agent's principal) and a complainant, then the employer is liable for a contravention of the Code for the act of the employee-agent is the act of the employer principal so far as the third party complainant is concerned. (For example, if a school principal caused a breach of an employment contract between a teacher and school board, by dismissing the teacher on a prohibited ground under the Code, then the school board itself would have contravened the Code. The complainant's loss is due to the act of the employer school board's agent, which is rendered in law the act of the school board).

(7) The most difficult area then arises when none of the factors in #1 to #6 above are present. To return to Professor Atiyah's quoted statement on "vicarious liability", if the employee is a mere servant

(not part of the 'directing mind', and there is not a contract between the employer and a third party that the servant-agent is causing a breach of) then is the employer liable for a contravention of the new Code by the employee in the course of his employment, even though there is no personal contravention of the Code by the employer?

Let us hypothesize a factual situation. Suppose an employee for a landlord refuses to rent to a prospective tenant, on a prohibited ground, in contravention of section 8. The employee does this notwithstanding the express general direction of the employer to all of its employees not to discriminate unlawfully. Before the aggrieved prospective tenant can complaint to the landlord, the employee leases the premises to an innocent third party. Can the prospective tenant-complainant come against the employer for the employee's breach of the Code? That is, is the employer vicariously liable for the employee's breach? (I am assuming, for the sake of argument that the wrongdoing employee cannot be characterized as a part of the 'directing mind' of the employer) If such a situation were to arise in respect of the old Code, the Nelson and Simms cases, supra, would suggest that as the employer is not personally in contravention of the old Code, then the old Code does not include liability on a vicarious basis.

One might like to think otherwise. Given the public policy underlying the purposes of the old Code, and the precept that it should be interpreted liberally as it is remedial legislation, one might assert that it could be interpreted so as to render the employer vicariously liable in such a situation. Moreover, beyond the benefits to society as a whole through effectuating the public policy enunciated by the

old Code, the obvious intent of the legislation is to protect the aggrieved complainant as an individual.

All of the views dealt with under situations #1 to #6 above, apply in respect of a situation under either the old Code or the new Code. However, in respect of the question of 'vicarious liability' (situation #7), the new Code has an express provision.

> 44. - (1) For the purposes of this Act, except subsection 2(2), subsection 4(2), section 6 and subsection 43(1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization. (emphasis mine)
>
> (2) At the request of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization, a board of inquiry in its decision shall make known whether or not, in its opinion, an act or thing done or omitted to be done by an officer, official, employee or agent was done or omitted to be done with or without the authority or acquiescence of the corporation, trade union, trade or occupational association, unincorporated association or employers' organization, and the opinion does not affect the application of subsection (1).

Thus, under the new Code there is vicarious liability for the purposes of the Code, except in 'harassment' situations (sections 2 (2), 4(2) and 6) and where the offence provision (subsection 43(1)) is involved.

As a result, there is generally vicarous liability under the new Code for situation #7 above, other than in the noted exceptional situations. Thus, the uncertain issue of 'vicarious liability' in situation #7 remains important only for the diminishing number of Boards of Inquiry considering complaints under the old Code.

However, the above analysis of the difference in the range of situations between #1 to #7 above remains very important for purposes of considering complaints under the new Code where the complaint relates to 'harassment' and thus is excepted from the 'vicarious liability' impact of subsection 44(1). The point is - the dividing line between situations of 'personal liability' (situations #1 to #6) and the situation of vicarious liability (#7) remains important. It is only in the #7 situation that an employer escapes liability for the 'harassment' by an employee.

Incidentally, there may be an omission by oversight in subsection 44(1) where it lists the entities that can be held vicariously liable, being ". . . a corporation, trade union, trade or occupational association, unincorporated assocation or employers' organization". Not included is the employer "partnership" nor the employer "sole proprietorship", unless the term "unincorporated association" can be interpreted to embrace such entities.

The approach of subsection 44(1) in expressly providing for vicarious liability, is commendable. Moreover, it is clearly consistent with, and facilitative of, the general public policy purposes of the new Code. The provision is also supportive of other specific provisions of the new Code. Subsection 40(1) provides for a board

of inquiry to make an order "to achieve compliance with this Act" and "to make restitution, including monetary compensation, for loss . . . " That is, in so far as the particular complainant is concerned, the effect of the Code is to provide the equivalent of a tort by statute. It is clear that the general benefits to society through enforcing the new Code, are largely to be achieved by extending, in effect, a civil remedy to individual, aggrieved complainants. It would be anomalous for an individual to have a broader scope for success against parties for torts under the common law (which allows for vicarious liability where there is a mere master-servant in the course of his employment and yet be limited (by there being no vicarious liability) in seeking restitution for the breach of the new Code by a servant in the course of his employment. Discrimination on a prohibited ground is a statutory wrong that offends society and is thus a wrong against the public, but it is also in the nature of a tort against the individual - a tort being a civil wrong independent of contract. Is there any meaningful distinction between physical injury due to trespass or negligence, and injury due to discrimination on a prohibited ground? Subsection 44(1) has the impact of saying that there is no meaningful distinction - vicarious liability should generally attach to the employer where his employee discriminates in the course of his employment.

The Evidence

There was a great deal of evidence given in this Inquiry, comprising seven full days of testimony and thirty-eight exhibits. The Complainant, Arny Iancu, age 36, alleges that he was discriminated against in his employment because of his nationality, ancestry and/or place of origin in contravention of paragraphs 4(1)(b) and/or (g) of the Ontario Human Rights Code, 1980, c.340. Mr. Iancu, born in Romania, raised in Canada, is a Canadian citizen, educated in France and Canada, with three university degrees. He is a very talented individual, trilingual (Romanian, French and English) and obviously has good academic credentials and ability. His spouse, Genevieve, born in Algeria, a dual citizen of France and Canada, is equally talented.

The Iancus moved to Canada in 1964, obtained their Bachelor of Education degrees from the University of Toronto, and thereupon sought and obtained teaching positions for the 1977/78 academic year at Penetanguishene Secondary School, a bilingual public school in Penetanguishene, Ontario, which school is within the jurisdiction of the Simcoe County Board of Education.

I emphasize that Mr. Iancu's academic record is excellent, and that he is a very well read individual with a great breadth of knowledge and experience. His written and spoken French and English is simply excellent, delivered with a slight, pleasant accent, and his personality, as conveyed through his being a witness, suggests an enthusiastic teacher.

The evaluations of him as a teacher while practice teaching were excellent. While giving a history class in Toronto the evaluator noted that Mr. Iancu's scholarship was good, that he is an accomplished linguist who could break "into Latin for 30 seconds" to aptly illustrate a point, his use of humour was excellent, that he "showed a breadth of knowledge and a sincere interest in student performance", and could even break into song in class on appropriate occasion (Exhibit #4). Another evaluator in another Toronto school also gave Mr. Iancu top ratings across the board, noting in part that Mr. Iancu has an "excellent, congenial personality" and that he has,

> "Very good ability to motivate students. Excellent sense of humour. High enthusiasm, good initiative. Total lack of any tenseness or friction between the students and the candidate." (Exhibit #5)

Another evaluator completed his favourable report by stating that Mr. Iancu had "the potential to be an excellent teacher!" (Exhibit #6) All evaluations and references were most favourable (Exhibits #7, 8, 9 and 10). Clearly Mr. Iancu had excellent credentials as a prospective teacher, and would be an attractive candidate for any school board in Ontario.

The Iancus were offered positions by more than one board, and accepted positions offered by the Respondent, The Simcoe County Board of Education (hereafter the "Board"), at Penetanguishene Secondary School (hereafter PSS) after being interviewed by Mr. D.R. Beatty, the then

principal of PSS. The Iancus needed to complete successfully two years on a probationary basis (signing the standard Probationary Teacher's Contract - Exhibit #22), to be entitled to receive permanent teaching certificates.

Mr. Beatty understandably was very enthusiastic about the two new teachers he had obtained for PSS, through hiring the Iancus. (Evidence, Vol.IV, pp. 9, 73).

The Iancus arrived at Penetanguishene for the school year comencing September, 1977. Mr. Iancu had some mild complaints, including being required to teach a "Man in Society" course when he expected to teach just History and Historie courses, and felt he received less supervision from the history department head, than he had expected. However, written evaluations of September 14, 1977 and January 30, 1978, by Mr. Beatty both stated that Mr. Iancu was achieving a "good" teaching rating as determined by the principal (Exhibit #11 and #12) which, while less than the "excellent" or at least "very good" ratings that one would have expected Mr. Iancu to achieve given his great promise, were certainly satisfactory. After visits by the department head to Mr. Iancu's classroom, Mr. Iancu was told he "should relax" (and he was also told this by principal Beatty at the end of his first year - Evidence, vol. IV, p. 77) but Mr. Iancu's overall impression, quite understandably, was that his superiors were satisfied. During the year, Mr. Iancu applied for and received an offer from the Toronto French School for 1978-79, but after consideration turned the offer down, thinking that his future was bright at PSS.

However, the Iancus did testify that they had chanced to meet the then chairman of the French Language Advisory Committee (hereafter FLAC), Mr. Bellehemeur, in September, 1977, who candidly told them that FLAC was opposed to the Iancus teaching at PSS, as they were not franco-Ontarien.[1] Mr. Iancu testified that Mr. Bellehemeur told them that FLAC had tried to have them removed, but that the Board had refused. FLAC is simply an advisory committee to the Board (as authorized by s.267 of the Education Act). However, Mr. Iancu testified that Mr. Bellehemeur was the only one who had made a direct comment to the Iancus about their not being franco-Ontarien. Mr. Irvin Harris, Director of the Simcoe County Board of Education confirmed in his testimony that Mr. Bellehemeur had spoken to Mr. Harris at one point about Mr. Iancu not being a franco-Ontarien. (Evidence, vol. III, pp. 36, 37, 63, 65).

There was a general pervasive tenseness over this period of time at PSS, given the strongly held view of some franco-Ontariens that their children should receive their secondary education in a unilingual French school, and that the teachers should not only be francophones, but be Franco-Ontarien or Quebecquois in ethnic origin. Similarly, the opposite viewpoint was strongly held by many non-franco-Ontariens that there should not be a unilingual French school.

An extract from a local publication, "La Gout de Vie", of October, 1978, (Exhibit #21) indicates the strong feelings held by at least one student (who also was a member of FLAC) of the franco-Ontarien community:

1. The spelling in English is franco-Ontarian. The term was generally defined by witnesses before the Inquiry as embracing any person whose mother tongue is french and who is raised in Ontario.

> Troisièmement, quelques professeurs ne sont pas franco-Ontariens. Certes leur francais est d'une qualité remarquable, mais par contre il parle très vite avec un dialecte et parfois une terminologie trop différente pour plusieurs jeunes. Est-ce cela la réponse à nos problémes? En plus il m'est très difficile de voir comment ces professeures, sont conscients des problèmes des franco-Ontariens.

Mr. Iancu's translation of this passage, given during his testimony was:

> "Thirdly, some teachers are not Franco-Ontariens. Certainly, their French is of a remarkable quality, but they speak too fast with a dialect and sometimes with the terminology too different from our youngsters. Is this a response to our problems? And more, it is very difficult for me to see how these teachers are aware of the problems of Franco-Ontariens." (Evidence, vol 1, p.112)

Mr. Donald Beatty, a unilingual anglophone, had been principal at PSS from 1967 to 1978 when he was promoted to Superintendent, and Mr. Gilles Cinq-Mars, a franco-Ontarien from Smooth Rock Falls, Ontario, was appointed principal of PSS for the 1978-1979 year. Some people were unhappy with Mr. Cinq-Mars' appointment, as he was a strong advocate of a bilingual French secondary school, rather than a unilingual school, for Franco-Ontariens. However, Mr. Cinq-Mars' appointment was seen in part by the Board as in fact ameliorating the tense political situation in the Penetanguishene community in respect of the issue of secondary school education (Exhibit #13). While Mr. Cinq-Mars favoured the Board's position of a bilingual, rather than a unilingual, secondary school, he also served to upgrade the french presence in the bilingual school by being a fluently bilingual franco-Ontarien principal.

Mr. Cinq-Mars evaluated Mr. Iancu November 20, 1978, (Exhibit #14 giving an overall "Good" rating, and ticking off the space on the evaluation form to indicate that Mr. Iancu would be favourably recommended for a permanent contract and permanent certificate. Mr. Iancu received a similar assessment December 5, 1978 by Mr. Gardhouse, superintendent of schools (Exhibit #15), also indicating that Mr. Iancu should be recommended for permenent contract. As well, Mr. Germain Bourgois, a supervisor of all bilingual secondary schools in Ontario (l'agent d'education Supervision) assessed Mr. Iancu very favourably in a November 30, 1978, classroom visit, (Exhibit #16) and on the basis of what he saw, would have recommended Mr. Iancu for a permanent certificate. (see also Evidence, vol. 1, pp.130-181).

Similarly, on December 6, 1978, Mr. Cinq-Mars gave Mr. Iancu a very favourable written evaluation after a class visit, with an overall "very good" rating and again indicating that Mr. Iancu would be recommended for a permanent certificate (Exhibit #17).

On the December 6, 1978, evaluation (Exhibit #17) it is to be noted in particular that Mr. Cinq-Mars gave Mr. Iancu a 'good' ("G") rating under "Teacher-Staff Relationships", a 'very good'rating ("VG") for "Teacher-Student Relationship", as well as an overall "Very Good" rating.

Mr. Iancu testified:

> "Q. All right, Did you discuss this report with Mr. Cinq-Mars afterwards?
>
> A. Yes. Mr. Cinq-Mars called me to his office and he said, Arny, I am very happy with you. This is your report and I will destroy the previous one."

Q. What did that mean?

A. I think I had made a remark to Mr. Gardhouse when Mr. Gardhouse was very happy with my teaching. I said, "Well, I am good, but I don't know if I am as good as for Mr. Cinq-Mars.

Q. Yes.

A. And Mr. Gardhouse didn't say anything, and I assumed that Mr. Cinq-Mars came into my class the following day probably to have a second look at me, I don't know, and I said, "Well if my report is much better, would you be prepared to destroy the previous one where I made the bad remark, the allegedly sarcastic remark..."

Q. Yes.

A. "And replace that one with this one" and, if I can recall, Mr. Cinq-Mars agreed to that.

Q. Okay. At that time, were you aware of any concerns that Mr. Cinq-Mars had about your teaching?

A. Oh, no. Not at all. I think everything was the best in the world.

Q. Okay. And, was there any improvement noted in his grading system?

A. Absolutely, I would say it was a 100% improvement coming from middle "Good" to a middle "Very Good." (Evidence, vol. 1, pp.90,91).

However, circumstances then changed rapidly. On February 7, 1979, Mr. Cinq-Mars again evaluated Mr. Iancu (Exhibit #8), giving an overall "good" rating, but with a very unfavourable comment and rating on the student-teacher relationship and leaving blanks in the matter of any recommendation for a permanent certificate. There is a dispute by Mr. Cinq-Mars and the Iancus as to what was said between Mr. Cinq-Mars and Mr. Iancu over this period of time. Mr. Iancu says he was called to Mr. Cinq-Mars' office February 7 following the classroom visit whereupon Mr. Cinq-Mars implied that the franco-Ontarien community did not like Mr. Iancu and did not want him to continue as a teacher.

Mr. Iancu testified:

Q. All right. Now, to elaborate on that a bit, what happened when he called you into his office? What did he tell you.

A. Well he wanted to be less formal, if I...I felt that he wanted to speak to me, not necessarily as a principal, but as a friend...

Q. Yes?

A. And I even remember that he came physically closer to be with his chair...it was a note of informality.

Q. Yes?

A. And he said, "Arny, you are a very good teacher. Unfortunately the French community doesn't like you, and there is a trend going against you. It will be very difficult to reverse that trend..."

Q. Yes?

A. "I will support you; the School Board will support you." And that was all.

Q. Did you ask him...did you understand what he was talking about?

A. Of course I understood, and I asked him to elaborate. I asked for...what do you mean? And he said, he had better not elaborate.

But he made me aware of the statement I just made.

Q. Did you have any knowledge of a feeling in the community against you?

A. I can't say that there was a feeling against me, no. There was no reason for the community to be against me.

Q. Did...did he discuss with you any complaints that he had received from the community?

A. No. Not at all. He never even made any mention about seeing my teaching or this report, not at all. That was completely outside the discussion. It had nothing to do with the lesson at all.

Q. And when he was talking to you about "the trend", what did you think he was referring to?

A. All he said, "...it was a trend...", but I...he referrred to the French community doesn't want me over there any more. That is what I understood he said.

Q. Mm. Hmm.

A. And, of course, I remembered the opening statement of Mr. Bellehumeur and...I am sorry to speak about him again...but he said that he would try everything in his power to have me out of Simcoe County before we even came.

Q. Was he alive at the time that this remark was made?

A. I don't remember. I don't think he was, no.

Q. Okay. And did Mr. Cinq-Mars attribute his knowledge to any source in particular?

A. No, he didn't say anything, no.

Q. Did he give you any advice as to what you should do to improve?

A. No. Nothing at all.

Q. Or if you could improve?

A. No. No. It was not mentioned at all about my teaching. As if he didn't even come to my class.

Q. Okay. Did he give you any guidance as to how you might improve this alleged bad feeling against you?

A. No. the only thing he said, that he would support me. The School Board would support me. (Evidence, Vol. I, pp. 95-97).

Q. So your only information, then, is that Mr. Cinq-Mars told you that there was a trend in the community against you, in the French community.

A. That's correct.

Q. Did he say French community or just community?

A. Franco-Ontariens, "there is a trend going against you, the Franco-Ontariens don't like you". (Evidence, Vol. II, p. 117).

Mr. Iancu said he was called to the principal's office March 1, 1979, and told that while Mrs. Iancu's contract was being renewed and made

permanent his was not. Mr. Iancu alleged that Mr. Cinq-Mars said the decision was not his but "came from above." (Evidence, Vol. I, p. 116 .

Mr. Iancu was given a copy of a letter (Exhibit #22) addressed to him from the principal, and dated March 1, 1979, which read:

> This letter will confirm our conversation of March 1, 1979 informing you that you would not be recommended for a permanent contract with the Simcoe County Board of Education, according to conditions of your probationary contract.

A formal letter of termination of Mr. Inacu's contract, dated May24, 1979, was sent to Mr. Iancu by the Board (Exhibit #23).

Mrs. Iancu confirmed her husband's testimony in this regard.

> "Q. Then they told us already that you were present at a conversation in March...
>
> A. Yes.
>
> Q. ...with Mr. Cinq-Mars and your husband. Could you tell us what happened then?
>
> A. Well, he told me that my contract would be -- well, I would have a permanent contract and permanent certificate.
>
> Q. Yes?
>
> A. And then he turned towards Arny and he said, "but I'm afraid, Arny, I won't renew your contract." At that point, Arny was very surprised and he said, "I don't understand because you already gave me a permanent contract and I was given a report where I was supposed to have permanent certificate and permanent contract."
>
> Q. Yes?
>
> A. And at that point Mr. Cinq-Mars said, "well, I've changed my mind and that's it and now I don't want to give you a permanent contract and a permanent certificate.

Q. Did he say anything else about what may have contributed to his decision.

A. Yes. He said tht the decision came "from above" and we asked him what did he mean by "above". I remember very well saying to him, it can't be Mr. Ramsay because he doesn't knkow us, khe never came because it was Mr. Ramsay who was Director of Education at the time.

Q. Okay.

A. So I said to him, "it can't be Mr. Ramsay because he never came to see Arny." It can't be Mr. Beatty because when Mr. Beatty was our principal he came to see arny, he never said there was something wrong. It can't be Mr. Guardhouse because when Mr. Guardhouse came to see Arny he gave him a permanent certificate and it can't be Mr. Bourgeous, so who was the "above".

He said, "well, I don't have to give you any answers. I can't extrapolate now. That's it goodby."

The interview was extremely short and we left.

Q. Okay. Did you, in your mind, have any question about whether there might be a second chance or ---

A. Well, I knew that in different countries when something is wrong, whether it be in France or in England, when something is wrong, there is always another chance given to the person, whether it be an extension or the probationary period or a change in school or in classes or discussion with heads of departments or with the principal about the actual fact.

But I expected -- well, I thought that Mr. Cinq-Mars would come up with a solution but apparently he wasn't giving any opening to that discussion at all.

Q. Okay. How did your husband feel about this in your view?

A. Very worried, of course, because at the same time he felt there might be something entirely wrong with the whole story because it cme so suddenly.

After over a year and a half everything seemed fine. I mean, the job that we were doing seemed to be appreciated by our superiors, because Arny was inspected many times. All of a sudden, Mr. Cinq-Mars comes in and says, "well, I don't want to renew your contract" and when we ask why he says, "the decision comes from above" as if he wasn't allowed to say it." (Evidence, Vol. II, pp. 153-155).

A further evaluation by Mr. Cinq-Mars of March 13, 1979, was very critical, centering upon Mr. Iancu's alleged inability "to relate to his students" (Exhibit #24). Apparently this further evaluation was made due to the initiative of the Ontario Secondary Schools Teacher Federation after Mr. Iancu complained, Mr. Iancu says he was never advised that any reconsideration of re-evaluation would be made.

Mr. Iancu was understandably very depressed and felt his reputation had been ruined. He could not get new employment as a teacher, although he applied many places. The Iancus moved to France in July, 1979, as Mrs. Iancu had duel citizenship but it was only one and one-half years later that Mr. Iancu could get any work there.

The Iancus were entirely neutral in the school dispute in Penetanguishene. They did feel some ostracism from some franco-Ontarien trachers. (Evidence, Vol. I, pp. 108, 109).

Mrs. Michele Hackstedder, a bilingual teacher then at PSS, testified that the situation over the language of instruction was tense at the school. She thought that Mr. Iancu had told her after the February 7 meeting of Mr. Iancu with Mr. Cinq-Mars, that the principal had told him the "trend was against him." She confirmed Mr. Iancu's evidence in this regard, as she testified that she was certain she was told by Mr. Iancu before March 1 that Mr. Cinq-Mars had told him "there was a trend in the community against him." (Evidence, Vol. II, pp. 232, 233). She was shocked at the abrupt dismissal of Mr. Iancu, and felt that the principal lacks skills in dealing with people.

Another teacher who had left PSS given the political issue at PSS, testified as to the pressure against non-Franco-Ontarien teachers.

Mr. J. De Schiffert, of Dutch ancestry, who taught in French at PSS for four years, confirmed that "a rather vocal small minority of Franco-Ontariens" adversely afected and created pressure upon enviornment and made non-franco-Ontariens feel awkward. (Evidence, Vol. II, pp. 7-10, 13). He left PSS in 1979 because he felt uncomfortable with the pressurs (Evidence, Vol. II, p. 11).

> "Q. All right. When you say that you perceived problems if you had to start teaching in French, where did you perceive those problems would arise? Was it your own ---
>
> A. Well, it was probably the fact that I did not necessarily identifiy with the Franco-Ontarien community to the extent that I felt that I had to instill Franco-Ontarienism into students." Evidence, Vol. II, p. 13).
>
> "A.. Well, that you obviously -- those pressures are there. If you're not going to be good enough so, therefore, there are pressures, yes.

Mr. Irving C. Harris, Director of Education for Simcoe County Board of Education, testified. He has progressed with some thirty years service, through all positions having been a teacher, a department head, a vice-principal, inspector, and having held various staff positions with the Board. As director, he is responsible for the day to day operation of about 100 Board schools, and was deeply involved in the french language issue. At the times material to the instant situation, 1978-79, Mr. Harris was Superintendent of Educational Services for the Board, later assuming the chief executive officer position of Director of Education.

Mr. Harris testified that in 1976 FLAC had recommended (Exhibit #27) (as FLAC could do pursuant to section 267 of Education Act, Exhibit #27) the establishment of a separate, unilingual french language school.

He testified:

"Q. The process then would you say began in earnest to press forward for a separate school then in 1976?

A. Yes.

Q. How did it start as far as the Boards involvement?

A. It started by the Board receiving recommendations from the French Language Advisory Committee and they not only came in the form of recommendations but a very severe expression of concern by the French Language Advisory Committee that the bilingual format used in that school, was not accomplishing one of the objectives that the French community had.

As far as the Board was concerned, the main objective was to allow a student to go through high school and maintain his fluency in French even though the school was basicallly an English speaking school. And the community, of course, is a basically English speaking community.

The people in the French community who were concerned about this pointed out however, that while it may have accomplished that objective in the long run their students were being, as they put it, 'assimilated.' And by 'assimilated', they meant that they were gradually losing their fluency in French and would eventually arrive at the point where they could not speak French, they probably could not read, they may understand it but even gradually they would lose that and become completely 'assimilated' as they put it. They used to describe themselves as an 'Island of French in the sea of English.'

Q. Was one of their concerns the French cultural concerns?

A. Very much so. They felt that if you are assimilated and lose the language you also lose the whole "cultural milieu" that they so highly praised.

Q. In late 1976 was there a special meeting held between the Board and the French Language Education Committee about these concerns?

A. Yes. If I recall the details, throughout the calender year 1976, we had these reports repeatedly from the French Language Advisory Committee and they became more and more insistent until finally the committee asked for and got from the Board a special meeting called for the purpose of discussing the concerns of the French community. No other item was on the agenda. If I recall the meeting began at 7:30 and went continuously on this subject until about midnight.

The result of that meeting was that the Board I think understood much better than it had previously by formal wirtten reports how the Francophone community felt on the subject. What it couldn't tell was how great the need was for a French Language Secondary School, a separate one from the existing one." (Evidence, vol. III, pp. 16-18)

"Q. What did the Board do, or what process did it select to attempt to conduct that investigation?

A. The Board sought advice from the Minstry of Education. In fact what we did is say to the Ministry, "do you have a means whereby we can easily and quickly study this problem and come up with an answer that tells us which direction we should go." The Ministry did have a means to assist us and offered that means. It was a service provided by the Ministry at that time, and still is in fact, called the 'Service for the Co-operative Evaluation of School Systems'. It's known by its initials." (Evidence, vol. III, pp. 18,19)

After an elaborate, lengthy and fair evaluation process the Board determined that the majority of the Francophone community did not agree with the FLAC objective of a unilingual french-speaking school (Evidence, vol. III, p. 24).

The Board's continuing position was to improve the bilingual capability of PSS. On June 13, 1979, the Board formally adopted a resolution (exhibit #28) against any recommendation of a separate and distinct French-language instructional unit. This was only done after the very comprehensive questionnaire evaluation was completed which established that some 84% of francophones in the school area felt the best

mode of education for their children was through a bilingual secondary school (Evidence, vol. III, P. 29). The Board did undertake to provide, administer and operate a secondary school in which simply French is the language of instruction if the Ministry of Education so wished and provided the financing (Exhibit #28). This was eventually the course of action chosen by the Ministry and a separate French language school, Le Caron School, opened for 1981-82, with some 107 students at the time of the hearing (Evidence, vol III, p. 33).

It is clear from all the evidence, and Mr. Harris' own testimony that neither Mr. Harris himself nor the trustees of the Board themselves discriminated in any way against Mr. Iancu (Evidence, vol. III, pp. 53, 57, 58). The formal resolution (Exhibit #30) dealing with general staff changes as of August 31, 1979, by the trustees of the Board, included Mr. Iancu in the listings, but this was simply a formal rubber-stamping of the recommendation of the Board officials, in particular, Mr. Haris, who in turn relied upon the judgement exercised by the principal of PSS, Mr. Cinq-Mars. I have no doubt in saying that there was absolutely no intent on the part of the trustees of the Board, or on the part of Mr. Harris, to unlawfully discriminate toward Mr. Iancu. Similarly, I have no doubt in finding that neither Superintendent Beatty, nor Mr. Iancu's Department Head, Mr. Quilty, had any intent to discriminate against Mr. Iancu. It remains to be determined whether Mr. Cinq-Mars discriminated against Mr. Iancu in contravention of the Code. If he did, the further question would remain as to whether the Board would be liable for the unlawful act of discrimination of its employee, principal Cinq-Mars, applying the framework of principles of law set forth supra.

The Board's policy with respect to staffing is expressed in its "Policy #1", dated January 22, 1969, (Exhibit #28), and is clear in stating that personnel are to be sought "who...are best suited through qualifications, experience and personal attributes to fill the positions available." Mr. Harris testified as to why it is necessary to delegate the hiring and firing of teachers to the principal of each school.

> "THE CHAIRMAN: I take it from what you have said is that in effect that is put into operation by the principal of the school. Both on the hiring side and on the termination side?
>
> THE WITNESSES: That is correct. Down at the bottom of the last paragraph, Mr. Chairman, the policy gives the responsibility to the Director of Education who is the Chief Executive officer of the administration and he is responsible as you can see there, for -- to the Board for hiring, dismissal, transfer, promotion and demotion of all of the Board's employees.
>
> Now obviously with almost 3,000 employees the Director can't be personally responsible so this is delegated and working on the principle that the person responsible for supervision of any personnel, whether it's a custodian or a teacher or whoever, is the person who should have the biggest say in who is selected for the job, based on policy number one and what recommendations he needs to make to him regarding the quality of his work and if that is not suitable it's the person immediately responsible who should decide that he can't measure up and therefore should be terminated.

There was general agreement by all witnesses who were educators in giving evidence before the Inquiry that the principal is the appropriate person to make the decision as to termination and that his decision will be operative. (Evidence, Vol. I, p. 179).

Reasons need not be given for a termination, although the termination must, of course, be lawful. (Evidence, Vol. iii, p. 43). That is, termination cannot be on a basis that is a prohibited ground under the

Ontario Human Rights Code. If the probationary contract (Exhibit #25) is not terminated, it automatically becomes a permanent contract. (Evidence, Vol. III, pp. 41, 42).

However, the Board has given instructions to its principals with respect to termination situations.

> "Q. And despite the fact that reasons need not be technically be given, what is the general philosophy of the Simcoe County Board with respect to advising its administration and making a decision on termination.
>
> A. We instruct our principals that in carrying out their supervisory function and supervising their staff, they're expected to do it constructively and humanely. That is to say, if a probationary teacher is found wanting in some way, his principal is expected to know that from direct observation as well as indirect observation. He is expected to explain to the teacher what is required of him, where the weaknesses are. He's expected to give him assistance either directly himself or through his department head or through other experienced teachers, and he is expected to give the teacher a reasonable period of time to improve before he finally comes to the conclusion that he wants to terminate the contract.

The policy of the Board is to delegate to its principals the hiring and firing of the approximately 3,000 teachers in the Board's system. While reasons for termination are not required, the Board instructs its principals to deal with teachers constructively and humanely, extending assistance in improving themselves, and giving a reasonable period of time for such improvement. When a probationary contract is terminated, the Director gives notice of the matter to the Board.

Mr. Harris telephoned Mr. Cinq-Mars to determine that the latter was still of the view that Mr. Iancu's contract should be terminated, before the Board formally terminated Mr. Iancu's contract by sending out its letter of May 24, 1977 (Evidence, Vol. III, p. 51).

Mr. Beatty testified as to his evaluation of Mr. Iancu's teaching performance, at the end of the 1977-78 school year, when Mr. Beatty was still principal at PSS.

> "Q. How satisfied were you, Mr. Beatty, then with Mr. Iancu's teaching performance?
>
> A. I was not happy at the way it had gone over the first year. I must say that the recommendations that I had for Mr. Iancu when he came on staff were high or higher than any teacher that I had coming from teachers college, from OCE, and I was most anxious to have him on staff as I was with Mrs. Iancu; but by the end of the year I would say that obviously we had offered Mrs. Iancu a head of department situation and Mr. Iancu's situation had not been as satisfactory.
>
> Q. At what point in the year did you conclude that you were not happy with him?
>
> A. As the year progressed there were certain numbers of students that were requesting to drop out of Mr. Iancu's classes and at that time I was aware that his relationship with the students was not what it might have been. (Evidence, vol. IV, P. 17).

He was asked as to why he then gave favourable evaluations.

> "Q. And how would you describe for us the good rating as a overall rating?
>
> A. With a new teacher, as I said previously, you are doing your very best to encourage him to be positive about the situation.
>
> It's obviously right in the middle of the scale, as it were, in the scheme of things, in the evaluation summary.

I think that's exactly where you would suggest for a beginning teacher: It would be somewhere right in the middle of it.

Once again, stressing the fact that within the first year you are certainly doing all you can to allow for the fact that a person is new in the business and you're doing your very best to be positive and constructive.

Q. Would you have had occasion to discuss your concern with Mr. Iancu's teaching performance with him, while you were still principal?

A. Oh yes. When we give those evaluations to the teachers we will sit down and chat with them. At the end of that particular year, as well, I spoke to Mr. Iancu about his performance of that year.

In fact, I recall it was on the day in which Mrs. Iancu accepted her appointment, or was offered her appointment, as Chairmanship and I spoke to Mr. Iancu on that particular day and suggested to him that we had not been as happy and I felt that he had a rather disappointing year, in that particular year, and was hoping it would improve the following year.

Q. What did you perceive to be his problem area?

A. Relationship with the students.

Q. What do you mean by that? I don't understand that term exactly.

A. The students have a relationship with the teachers. I suppose it is the same as you and I may have a relationship. There are people that we feel that we get along well with. There are people that we feel we don't get along well with. I think that's just human nature and this can be the situation with students.

In certain cases with teachers, with very high educational qualifications, they may very well speak in a language above the comprehension of the average student. That can cause certain difficulties.

...

"Q. Did any of these student relationship problems, in your view, have anything to do with the political situation in the community, French-English situation, or the fact that he was not Franco-Ontarien?

A. If that was the case, I certainly was not aware of it. Again, looking at the two situations, Mr. Iancu and Mrs. Iancu came together to the school with more or

less the same background and her performance did not cause the students to be concerned, so that I cannot see the outside influence speaking about one and not about the other." (Evidence, vol IV, pp. 19, 20-22).

...

"Q. There seems to be tendency here to sort of hang our hats on four or five pieces of paper, which are evaluations. You're an experienced principal, how full a picture would these four or five pieces of paper give of the principal's mind, in evaluating a probationary teacher?

A. A very small portion of all the concerns and highlights of a person. It goes on from day to day, with your contact with the person himself or herself, with your contact with the students that are there, with the contact with the teachers and so on, you're, I suppose, forming opinions day in and day out." (Evidence, vol. IV, p. 131).

Mr. Beatty was quite straightforward in his testimony.

"Q. Okay. So I'm suggesting as far as your advice to him is concerned, Mr. Iancu would have no reason to suggest he was in any kind of serious trouble. Is that correct?

A. At which point?

Q. Up to the end of the year.

A. I think that would be true.

Q. All right.

A. We're talking about his first year there.

Q. Yes.

A. That's right.

Q. All right. And you say you were becoming concerned about a drop out rate?

A. That's right.

Q. Okay. You didn't speak to him about it, if at all, until the end of the year though?

A. That's right." (Evidence, vol. IV, pp. 64, 65).

"Q. Right. And I would also suggest to you that you had very high expectations of indeed Mr. Iancu. You said you had as high of him as anybody who had every come out of OCE.

A. That's right.

Q. Pretty high expectations.

A. That's right.

Q. All right. I suggest to you then you could be disappointed without having decided that he was a complete disaster.

A. If I felt he was a complete disaster I would have been asking him to leave rather than asking to improve for the next year.

Q. All right. Did you have any sense yourself why students might be dropping out of his classes? You say this was your concern.

A. Well, if I would have guessed at what it was I would have said it was the high degree of knowledge and background that Mr.Iancu had and in his first working with students, I hopefully would have thought that it would have taken him that year to realize that students absorb at different rates. The instruction and that dealing with the general level, or a level 4 student, that you would have to modify your program to suit the abilities of those students. I would have guessed that he was finding that difficult to do because of his background, almost obtaining a doctorate at that stage.

Q. All right. Again, if this was your feeling, how would you suggest that someone might improve that? What kinds of things should a person do to put himself more on a level?

A. I think the method of instruction, the program which you develop for the students would reflect that.

THE CHAIRMAN: Could it have been that he was too demanding of the students?

THE WITNESS: Yes. That could have been." (Evidence, IV, pp 73, 74).

"THE CHAIRMAN: I take it, tried to apply himself diligently, but that was your perception anyway.

THE WITNESS: I would assume it certainly was. Yes.

THE CHAIRMAN: Then perhaps he was just doing too much as it were or not bringing it down to their level.

> THE WITNESS: I think that your last statement is the one that I would agree with most, it would be bringing it down to the students level and finding out what you can expect from that kind of student. I think experience is what provides that for a teacher. (Evidence, vol. VI, p. 76).

Usually, if a teacher does not have sufficient skills to warrant receiving a permanent contract, it is obvious in the first year of teaching, and his or her contrct is terminated at the end of the first year (Evidence, vol. IV, pp. 112, 113).

Mr. P.E. Quilty has been the Department Head, History, at PSS for some fifteen years, and taught some twenty-six years. He testified as to his concerns as to Mr. Iancu's progress as a teacher:

> "Q. Did you have any serious concerns about him as a teacher by the end of his first year?
>
> ...
>
> A. Well, I indicated that to Mr. Beatty in a manner that we could do something to help Arny, help Mr. Iancu, in every way possible, yes, but I did indicate to Mr. Beatty serious concerns about his progress." (Evidence, vol. VI, pp. 7, 8).
>
> "Q. How did he respond to those suggestions?
>
> A. ...recommendations. I would say initially I think Arny and I had a good working relationship in the school, but I became aware, or it seemed to be that a number of my suggestions weren't being picked up and that concerned me.
>
> Q. Did you express that concern to him?
>
> ...
>
> A. Yes. I think if there was a specific area, that you would perhaps call that to his attention. Again, one specific thing I -- that's very difficult but in the area of something that may seem trite, the preparation of examinations which is a very important pedagogical -- it's a teacher's responsibility, it's very important

-- evaluation. Again I can't specifically, I don't have any documentation but I think that's one area that we discussed repeatedly." (Evidence, vol. VI, pp. 8, 9).

"Q. Did you notice anything about his relationship to his students in that school year, 1978 to '79 year?

...

A. Students came to me and had certain opinions and certain complaints. It's fair to say, as the head of the department, that I did in my own mind try to deal with complaints with the students in such a way that Arny would be fortified, right, and that's the way that I like to deal — I like to support my staff members and I think they need all the support, but, yes, students did come to me.

Q. Was there a common thread of the complaints that you heard from these students?

A. I think a general criticism of methodology and organization, that sort of thing. There were -- certainly there were students who came and told me that they simply didn't like the atmosphere in the classroom, now, I don't know. I think that's a fair statement.

Q. Did any of the complaints appear to be at all caused by or concerned about his nationality, or his ancestry, or his place of origin?

A. None whatsoever.

Q. Did you have a concern about the number of these complaints you were receiving from students?

A. In a general way, but I did become concerned when either the guidance department came to me or I went to the guidance department, which I'd be in every way practically.

Q. Yes? What happened there, what did you learn there?

A. Well, from the head -- either the head or his assistant, that he was concerned, he indicated concern to me that there were numbers in -- he considered to be inordinate numbers, wanted to drop the subject. I was concerned, it was my department and I was also concerned for Arny." (Evidence, vol. VI, pp. 12, 13, 14).

"Q. Were you surprised when you learned of that decision that he was not to be recommended?

A. In view of the concerns that I had indicated to the principal and as the year progressed, I was not surprised." Evidence, vol. VI, p. 22 .

...

Q. Well, when you say you assumed he knew you were deeply concerned, are you talking about the second year or the first year?

A. Cetainly in the second year, yes." (Evidence, vol. VI, pp. 64, 65).

"Q. Okay. Can you remember what kind of concerns they were? We've heard about attitude towards students.

A. Well, it came to my attention that there was -- we've used the term "sarcasm", I don't know whether the student would use that term -- he speaks in a terribly unfriendly way to me, that sort of thing.

Q. All right.

A. I think there's a common denominator there.

Q. All right. Were there any others though, were there a variety of complaints?

A. Well, he's certainly not friendly with us.

Q. That's the same kind of comparison, is it not?

A. I think and, again, about the general classroom management with respect to methodology but the more I think about it, just his demeanor in the class.

Q. That's what stands out in your mind?

A. From the students' point of view, right.

...

Q. You were close in proximity to the classroom.

A. I think Mr. Iancu was disappointed in his own performance.

Q. Go on.

A. And I think that affected his pedagogy, it affected his relationship with his students. I think it affected everything, just his ---

Q. That's what you attribute it to?

A. Partially, partially.

Q. What else?

A. I don't think he enjoyed being in the classroom.

Q. That's your overall impression?

A. Yes." (Evidence, vol. VI, pp. 87 - 90).

...

"Q. What about the other classes. Did you think that he had problems with rapport with the other history classes and historie classes?

A. There were instances.

Q. Instances not necessarily problems. Did you think there was a serious problem or a problem?

A. I thought it was a problem with respect to Mr. Iancu's performance in the classroom overall, yes.

...

"Q. I take it in any event it seemed to be worsening at that point or worsened, is that right, the student rapport?

A. There certainly was no improvement.

Q. Well, did you think it was the same as it was in the first year?

A. No, it definitely was -- there definitely were more problems in the second year?

Q. Okay. Were there more problems in the second term of the second year?

A. I would think so." (Evidence, vol. VI, pp 128, 129).

There was considerable evidence given about the "drop-out" problem in Mr. Iancu's classes. When examined in-chief, Mr. Iancu, the first witness in the Inquiry, testified.:

"Q. All right. Were you aware of any problem with respect to "Drop-out rate" in your class?

A. Yes. I realized that the drop-out was, in effect, Man in Society, from the very first day I came and I said,

'if you want this credit, you had better earn it.'

Q. All right. Were you aware of a drop-out problem in any of your other classes?

A. No, I wasn't particularly aware of an alarming drop-out in any other classes, no.

Q. Were you ever spoken to about a "Drop-out Rate", in your classes by anyone in the school?

A. No. I was never...never, never contacted by the guidance department, or even by anybody telling me...or inquiring, 'how come there are so many drop-out in my class.'

Q. What did you attribute this drop-out rate in Man in Society to?

A. To be honest in the first year, I thought the drop-out was the very, very beginning, because I said to the students, 'if they want to get a credit, they have to earn it.' And then the word got back.

Secondly, most of the students that went into Man in Society, went to get a second credit, which is actually normal, but it was...it had a history, Man in Society, where the credit would be given, just with an expose, or something like that, and I had to make them work.

Q. Okay.

A. So I would say because I tried to teach properly. (Evidence, vol. I, pp. 105, 106).

Mr. Quilty testified that there was a serious drop-out problem (Evidence, vol. V, p. 31) and that he told Mr. Iancu.

David Paille, the head of Guidance at PSS for some sixteen years, testified. He testified as to Mr. Iancu's teaching problems.

"A. ...Now, during the second year, '78/'79, if I am correct?

Q. Yes.

A. Miss Francis, and myself, became concerned over the ...became disturbed, I would say, over the large number

of students coming down with complaints, who wished to either change teachers or drop the subject altogether.

Q. Stopping you right there, for a second; was there a common denominator in the type of complaints raised to you?

A. I would think that there was two things, maybe; having trouble following the subject matter and, secondly, perhaps, a conflict in personality with the student and the teacher.

Q. What do you mean by that? Expand on that for us; what sort of thing was the complaint centered on?

A. Well, I think some of the students that came in felt belittled by the approach of the said teacher, and this was a fairly general complaint. They felt that the teacher talked down to them and were...in several instances, they were...they felt insulted and wouldn't go back. They didn't want to go back to class.

...

"Q. How many? More than were dropping out of any other...?

A. Certainly, quite a number more. It was an unusual situation at that particular time.

Q. What time in the school year would this have come to your attention.

A. In the...towards the later fall. October, November, December.

Q. And would these students have gone through the full procedure of getting a signature by Mr. Iancu, and a signature by the parent, and the documentation returned to you?

A. I would say, for the most part, yes.

Q. And, in the fall, did you pass on your concerns to any other members of the staff at PSS?

A. There are several cases that was discussed with Mr. Iancu on that one point...

Q. By yourself?

A. Yes.

Q. And what sort of thing did you discuss with Mr. Iancu?

A. Why the student was dropping and, you know why this...well, what do we do to resolve the situation.

Q. Did he seem to think he had a problem?

A. I couldn't say.

Q. How did he react to your relaying this information to him, then?

A. Well I think he was upset about it.

Q. And did you discuss the concerns that you were having at that point, with anyone else, in his department.

A. Well, yes. The usual procedure, if there seems to be a problem in a department is to contact the head of that department and indicate to him that we felt there was a concern and that the head should look into it and try to resolve the situation before it got out of hand.

Q. And did you speak to the head of that department?

A. Yes, Mr. Quilty was contacted and shown that there was some problems and that he should look into it and...

Q. You said the 'usual procedure'; was this a usual situation regarding a teacher or an unusual situation that you were facing with Mr. Iancu?

A. I would say it was unusual, yes, because of the numbers again." (Evidence, vol. VII, pp 60-63).

The records prepared by Mr. Paille (Exhibit #33) confirmed a very high drop-out rate generally in respect to Mr. Iancu's classes. Evidence, vol. VII, pp. 80 - 123). All the evidence would also indicate that there was no higher an incidence of dropouts in respect of the francophone students than in respect of the anglophone students. (Evidence, vol. VII, 66).

It was in respect of the "Man in Society" course in 1978-79 that Mr. Iancu had particular problems. By February 7, 1979, some 48% of the enrolled students had dropped out of "Man in Society."

Miss V. Francis, a guidance counsellor at PSS, confirmed Mr. Paille's testimony.

"Q. And what were the complaints you were hearing, which were bringing the students to you, in these matters?

A. I would say that most of them would be personality clashes with Mr. Iancu. They could not get along with him, or they didn't appreciate the way he dealt with them.

Q. Is this the most frequent complaint you can recall from the students.

A. I would say the other...the second one, the second reason would be that they did not understand what he was teaching.

Q. I see. Was there any complaint brought to you by the students that didn't want to be in his class because he was not a franco-Ontarien teacher?

A. No. Never.

Q. Did you have occasion to discuss the student dropout situation at any time with Mr. Iancu?

A. Yes, I did.

Q. When would you have first discussed that situation with him?

A. Well we would discuss it with each and every student who came to us. I would meet him in the corridor, or make a point to speak to him about it, within, maybe two or three days.

Q. By 'him', do you mean, Mr. Iancu?

A. Yes. Mn hmm." (Evidence, vol. VII, pp 223 - 224).

THE CHAIRMAN: Did you say he came into your office? Did I hear you right; did you say he screamed at you once?

THE WITNESS: Yes, he did.

THE CHAIRMAN: And what did you mean by that? I mean, I know what 'scream' means, in the usual sense. Literally, he screamed at you? Yelled, very loudly?

THE WITNESS: Yes. Yes, he did.

THE CHAIRMAN: What did he say?

THE WITNESS: I don't remember his exact words, but I was sitting in the outer office, with other students there, when he came in and...the gist of it was, 'This other student has dropped out, what are you doing to me?' That type of thing.

THE CHAIRMAN: So it wasn't a matter of being curt or just being gruff, you are saying...

THE WITNESS: No, he was really upset, yes.

THE CHAIRMAN: And yelling loudly; is that what you mean by 'scream'?

THE WITNESS: Yes. yes. Mm hmm.

It is clear from the above quoted evidence that Mr. Iancu was having serious problems with his classes in his second year of teaching. In particular, he was experiencing a large number of drop-outs. Whatever the reason and merits (or lack thereof) for the students dropping out of Mr. Iancu's classes, it is clear from all the evidence that it had nothing at all to do with his not being a franco-Ontarien. Moreover, Mr. Iancu himself was well aware of the mounting drop-out problem.

Mr. Iancu testified that he felt Mr. Cinq-Mars had not supported a Quebecois play, "La Belle Soeur", he hd tried to put on, (the first time a Franch play was attempted at the school) but which was cancelled by Mr. Iancu after some weeks at the rehearsal stage because of problems with the student participants.

However, Anne DesRoches, a student in the play testified:

"A.. There wasn't one rehearsal where there wasn't one person that didn't cry. He didn't make one student cry.

Q. What would that have been? Why would they cry?

A Well, first, because his attitude was perfection and superiority made us really nervous, plus, if we didn't meet up to what he wanted and what he thought was right, then we were wrong, automatically. He would be angry with us.

Q. I am sorry?

A. He would be angry with us if we didn't do what he thought was right." (Evidence, Vol. VII, pp. 11, 12).

On one occasion, Ms. DesRoches was five minutes late for a rehearsal, apparently because of the tardiness of her mother's transporting her by car.

And he said, "Why were you late?" And I said, "Well, I had work to do before coming here." And he said, "Well, my wife and I have work to do, too, but I was here early. There is no reason for being late", and he was going on saying, the same thing.

And so I said, "Well, sir, if you have anything to say, you can talk to my mother. She is to blame. She is to blame. I am not the one that drove me here."

Q. Now, Mr. Iancu has testified that you insisted in the middle of a rehearsal that he leave the rehearsal and go to the car, where your mother was waiting to speak to him.

A. My mother wasn't there. She was gone. and I am not the type to demand. I knew...like, I was late, I knew...I wouldn't have gone and demanded, because I was late, I admit, but I wouldn't go demanding that he speak..because she wasn't there.

Q. All right. What...carry on. What happened then?

A. So when I said, 'you speak to my mother', he said, "Speak to your mother! What should I want to speak to your mother? Ha, to your mother, Pfff!" And, of course, I got very insulted because...and I was quite upset.

So I pointed my finger at him, and I said, "If you don't have any respect for my mother, or for..." and I meant to say, '...for anybody else in this play..', but I stopped there and I started crying, and I took my play, and I just put it on the table like that and the staple was gone, so the sheets went like that and I left the play.

Q. Are you certain that you didn't throw it on the floor, at his feet?

A. It was on the table in front of the other students.

Q. Now he has testified that you threw the script on the floor, at his feet? What do you have to say about that?

A. I didn't. It was on the table.

Q. All right. Did you have any more conversation with him?

A. Never.

Q. What did he say to you then, after you started to cry?

A. He just went, "Oh bebe", and then...well, I just left.

Q. I am sorry, "Oh...", what?

A. Bebe.

Q. What does that mean?

A. It is French for baby.

Q. Yes?

A. And so I...I just left. I just left and, he just mumbled, and he said, "Ha!", you know, "What a baby", and such an act, like that.

And I was told by my friend that was there she said, "Well, maybe she isn't to blame." She said, youknow, "You are really too hard on her", and he said, "What is going on here? Do you want to continue this play or not?" And the whole play was quit, they all quit.

Q. That same night?

A. Mm hmm. Ten minutes later, they all walked out. (Evidence, Vol. VII, pp. 17, 18, 19).

Her mother, Mrs. Louise DesRoches, confirmed that she had caused her daughter to be about five minutes late, and that her daughter was crying when whe later picked her up, and that the students told her that they had all quit that night. (Evidence, Vol. VII, pp. 41, 44).

Mr. Iancu also thought that a french language newspaper, "La Belle Epoque" (Exhibit $19), he was and his wife had started but discontinued after two issues, had failed because of hostility from the french speaking teachers.

Mr. Iancu testified:

> A. I attributed this to the fact that because I was not a Franco-Ontarien I didn't have the right to have a newspaper, something like that. (Evidence, Vol. 1. p. 103).

Mr. Donald Limoges, technical director and electronics instructor at PSS testified:

> "Q. And in the course of your duties as a teacher, did you come to hear any attitudes or complaints from the students about Mr. Iancu?
>
> A. I am afraid so. I learned, through various conversations and idle comments from students, regarding Mr. Iancu, that I suppose weren't particularly favourable.
>
> Q. Where would you have heard this sort of comment? On a formal basis?
>
> A. Oh, no. Oh, no. In this particular case, it would be students coming into my classroom, after having been through a session with Mr. Iancu, and they weren't, in the sense, as you might say, formal complaints, they were casual remarks that were being made.
>
> Q. And would this have been in 1977/'78 school year or...

A. I think more '78/'79, is his second year. The general feeling seemed to be that he had a bit of an attitude that was...well, I guess to quote my own son, who had him, "arrogant".

Q. And, were you receiving complaints from...or hearing them, I should say,...hearing complaints from students, about other teachers?

A. Well, you always get that, but it is the nature of the complaint, I guess, is the difference here, in that particular case. Often students would come into a class, following another one, complaining about the workload, they may had or some particular little incident, but in this case, with Mr. Iancu, as I recall, the complaints seemed rather consistent, pointing, generally in that same direction of his attitude towards the students. (Evidence, Vol. VII, pp. 154, 155).

...

"Q. Did you, personally, observe, any indication of this attitude you described, in your contact, yourself, with Mr. Iancu?

A. The only thing that I recall that I suppose would be of any significance, was in a social aspect, with Mr. Iancu and it seems, I guess, over the years of our socializing with him, particularly, I suppose towards the end of his first year, he seemed to be displaying an increasing attitude of disrespect...disregard...I am not just really sure what word to use to describe our students at the school.

He certainly didn't feel that they were up to his standards, whatever...

Q. Sort of general...

A. Oh, there is no question about it, I don't think he felt that the students at Penetanguishene Secondary School, and for all I know, it could be even Ontario students, for that matter, just didn't have the wherewithall that he expected.

Q. And he expressed that to you, personally?

A. He certainly did." (Evidence, Vol. VII, pp. 156.

He was not surprised when he learned of the decision to terminate Mr. Iancu's contract.

Mrs. Nancy Easey, a teacher in the commercial department at PSS, testified. Mr. Iancu had asked for volunteer student typists to type parts of his play, Les Belles Soeurs, and it would appear that a good deal of effort was made to assist him in this regard. However, as Mrs. Easey testified, problems arose.

"A.. Anyway, he wanted to take this work, you see, and I said, "Now look, they are in two piles; make sure you don't mix them up. This is Act I; this is Act II", "Okay. Fine. Fine", and he picked them all up, and away he went.

And, we went on with the typing of the stencils. And then, I don't know whether it was that day or the next day, I think it was that day, I was teaching in the classroom next door and every once in a while, I pop into the Practice Office to see that everything is okay, and the machines haven't broken down and soforth; and I came in, and there was a girl in the Practice Office crying. There were papers all over the floor and all over the desk, and I said "What happened? What is going on? Why are you crying?" And I learned that Mr. Iancu had come in and yelled at her and said the work was sloppy and couldn't see how anybody could have two page 7's, and two page 4's and so on, and had thrown the work all over the counter at her.

And, of course it landed all over the office.

Q. What did you do with it?

A. Well, I sent her off to the washroom, first, to calm her down, and then I put an "On call" out for the girls who were working on the play to come to the Practice Office, and they all came in and, we picked it up, and we collated what we could, and put it together, and I left word for Mr. Iancu to come to the Practice Officer at 3:10.

Q. Now before we go to the 3:10, you say he said to you, 'how could you have two pages 7's and two page 4's, would they be, in fact, different pages then, from what you described, or would they be...?

A. Well, one would be Act I, page 7, the other would be Act II page 7.

THE CHAIRMAN: Would it be marked?

THE WITNESS: No, that...

THE CHAIRMAN: Roman Numerial II, page 7...

THE WITNESS: this was my fault. It should have been marked, "Act II, page 7", and "Act I, page 7", I didn't think about it, at the time.

It wouldn't have mattered if we have been allowed to collate them.

THE CHAIRMAN: I understand.

BY MR. COCKBURN:

Q. And, at 3:10, what happened?

A. Mr. Iancu came in the office, and I said, "Here is your work", and it was in a big box of stencils, and the work was all sitting on top, all put together, and, I don't exactly know what he said to me, he said something, and I said, "Just a minute", I said, "I want to talk to you", and he starting yelling at me, and telling me the work was sloppy, and he had never seen such poor work, and we were taking too long to do it and so forth, and I said, ...I told him to "Shut up and listen", to be quite frank, because he was yelling, so I yelled back.

And I told him he wasn't to talk to my students that way; if he had any complaints he should come to me about it, and not take it out on the students. And I said, "Here is your work; that it, and don't come back. We will not do any work for you in the Practice Office." (Evidence, Vol. Vii, pp. 200-202).

The only PSS student to testify was Miss DesRoches. She had Mr. Iancu as a teacher.

"Q. What did you observe, if anything, about his attitude towards students?

A. Well, when I had him in class...well, he was always...seemed always more superior and I accepted that, of course, because he was my teacher, but sometimes he went too far and, as long as you were able...he was able to laugh at you, then you were all right.

Like, there was this one kid that had an acne problem

and one day, Mr. Iancu like, in the middle of the class, stopped and said, ...looked at him and said, "What is the matter with you? You look like you have...the red thing on the siren from an emergency vehicle."

Q. Was the student finding this funny?

A It's...well, it is embarassing; it is insulting. He seemed to insult a lot of students.

And, there was this other time, that the student had missed a day of school and Mr. Iancu asked him why he had missed and the student said, "I had to help my father plant the corn", and then he just laughed and he said, "Oh, I guess there is a lot of you farmers around here in this part", and then nobody laughed because nobody thought it was funny because 80% of the students are from the farms and a lot of them thought it was insulting.

Q. What did you observe, if anything, about his temper towards students?

A. He was very tempermental. He would go into little fits and then he would get back really nice, and then he would go back, that's like, half the students were very uncomfortable in the class because they didn't know, like, what would happen next.

Mr. Harris testified that the field representative of the O.S.S.T.F. had asked for an opportunity to help Mr. Iancu overcome his teaching problems over March and April (Evidence, vol. III, p.50), but said he learned later (he was not sure from whom) that these efforts were not appreciated by Mr. Iancu. (Evidence, vol. III, p.50). Mr. Morris did not testify at the hearing.

Mr. Iancu testified that he knew nothing in advance of Mr. Cinq-Mars' classroom visit of March 13, either from Mr. Cinq-Mars or from Mr. Morris, and that Mr. Morris later told Mr. Iancu he had forgotten to tell him. However, it seems that Mr. Morris did have one meeting with Mr. Iancu a few days before this further assessment. (Evidence, vol.VII, p. 137). However, Mr. Cinq-Mars confirmed in his testimony that Mr. Iancu did not know of the intended re-evaluation (Evidence, vol. V, p. 257; see also Evidence of Mr. Iancu, vol. VII, pp. 126-129).

While Mr. Morris did not testify, it is clear from the correspondence of the O.S.S.T.F. (Exhibit # 36) that (for whatever reason) he thought mediation was not possible. A complaint by Mr. Iancu was heard by the Judicial Council of the O.S.S.T.F. against Mr. Cinq-Mars, that Mr. Cinq-Mars had

> "Failed to provide Mr. Arny Iancu with a warning in writing and further failed to give Mr. Iancu adequate assistance and reasonable time to improve before recommending his dismissal to the employing board." (Exhibit # 36).

The Report of the Hearing Committee concluded:

> "While the procedure followed by Mr. Cinq-Mars in documenting this case was not as complete as would appear desirable under the Recommendations of the O.S.S.T.F. Respecting Dismissal and Demotion, it is found that written warning was given and that the time available for improvement was terminated solely by the decision of Mr. Iancu. Further, the attempted mediation by the O.S.S.T.F. Field Secretary during that period was also terminated by the same decision of Mr. Iancu." (Exhibit # 36).

The re-evaluation of March 13 was done only one day after Mr. Iancu had received the written February 7 evaluation form, and to Mr. Cinq-Mars knowledge, Mr. Iancu was under a great deal of continuing stress subsequent to the March 1 meeting (Evidence, vol V, pp. 263-266). The March 13 re-evaluation, unexpected from Mr. Iancu's standpoint, was almost meaningless. Moreover, the main criticism by Mr. Cinq-Mars of that class seems to have been that only three students were present (Evidence, vol. V, pp. 245-252) In any event, it is clear from all the evidence that Mr. Cinq-Mars had made his mind up with finality as of March 1 that Mr. Iancu's contract would be terminated.

Were Mr. Iancu's problems somehow a situation of tyranny by the students? Could Mr. Iancu's relationship with his students deteriorate so quickly over two months, from December, 1978 to February, 1979? Alternatively, was Mr. Iancu of one personality with his students, yet another with his superiors and colleagues? Alternatively, was at least one operative reason for Mr. Iancu's dismissal the fact that he was not franco-Ontarien?

Both Mr. Iancu and Mr. Cinq-Mars attempted to rationalize their positions after the fact. Mr. Iancu knew much more about his deteriorating position than his evidence indicated, yet he knew much less than Mr. Cinq-Mars' evidence indicated. On all the evidence, it is clear to me that Mr. Iancu knew throughout the 1978-79 school year about his ongoing problems with his students and classes.

It should also be noted that in the November 20, 1978 evaluation by Mr. Cinq-Mars (Exhibit # 14), that Mr. Iancu received only "Fair" ratings for "Teacher-Parent Relationships" and for "Teacher-Student Relationships", and that there were some (albeit constructive) critical comments written upon the evaluation form.

The criticism of Mr. Cinq-Mars is that he was too generous (measured against the problems he knew of and his own standards) to Mr. Iancu in the fall of 1979, and in clearly conveying to Mr. Iancu the impression that he would be recommended favourably for permanent status. I do not think Mr. Cinq-Mars bore any ill will towards Mr. Iancu, nor do I think, and I so find, that he in any way discriminated against Mr. Iancu because he was not a franco-Ontarien. It must be noted that Mr. Iancu himself testified, in effect, that as of December 6, 1978, Mr. Cinq-Mars seemed to be trying to help Mr. Iancu achieve permanent status. With respect to the December 6, 1979, evaluation Mr. Iancu testified:

Q. All right. Did you discuss this report with Mr. Cinq-Mars afterwards?

A. Yes. Mr. Cinq-Mars called me to his office and he said, "Arny, I am very happy with you. This is your report and I will destroy the previous one." (Evidence, vol. I, p. 90).

Mr. Cinq-Mars testified about this as well.

Q. Well,I don't know. In November, he wasn't happy with your evaluation; he suggested that you do another one.

A. Yes.

Q. He didn't try to escape from that, did he?

A. Well, yes he did.

Q. How?

A. He requested that that November 20th report did not go to the superintendent.

Q. Did it?

A. No.

Q. Did ne ask you to do another one?

A. Yes.

Q. And was that a good one?

A. That was the December the 6th one.

Q. All right. When Mr. Iancu ask that that not be sent, did he say, specifically, "don't sent that one", or did he say, "do another one and send the best"?

A. He said, "please, don't send that one".

THE CHAIRMAN: Just, if we could stop there for a moment. Do you normally send in the evaluations after you do them?

THE WITNESS: On probationary teachers, we are obliged to send three probationary reports.

THE CHAIRMAN: But what I am asking is: do you collect them and send them at the end of the year or would you send them in right after?

THE WITNESS: No, there are specific dates that they have to be sent by. I forget the dates right now, but they would...I would satisfy those dates.

THE CHAIRMAN: I take it the first one would have to be sent before the end of the fall term?

THE WITNESS: Yes.

THE CHAIRMAN: So, I take it you sent the December 6th report?

THE WITNESS: Yes.

THE CHAIRMAN: But you didn't send the November 20th one for the reason you have just given?

THE WITNESS: That is correct.

THE CHAIRMAN: Ms. Minor.

BY MS. MINOR:

Q. Were you happy about that situation?

A. No.

Q. Well why did you agree?

A. As a favour.

Q. I suggest that might be a little hypocritical on your behalf, Mr. Cinq-Mars. You apparently had no confidence in the December 6th evaluation, but you were prepared to send that to the superintendent, rather than the 20th one?

A. If I am to be hypocritical in favour of a teacher, I don't mind that at all. (Evidence, vol V., pp. 179-181).

However, Mr. Iancu did not know, or appreciate, the possible adverse consequences to his career because of these problems. To the contrary, Mr. Iancu had a false sense of security and confidence because of the generally favourable evaluations he received throughout the fall of 1978, and, most specifically, because of the fact that his principal was expressly indicating on the evaluation forms that Mr. Iancu would be favourably recommended for permanent status. Mr. Iancu was never really made aware by Principal Cinq-Mars how serious his deteriorating position was until March 1, 1979, when he was, in effect, terminated with no meaningful possibility of then redressing the situation.

Mr. Cinq-Mars said he talked to Mr. Iancu several times throughout the year, (Evidence, vol. V, p. 127). Mr. Iancu said that Mr. Cinq-Mars only spoke with him at the time of the formal evaluations.

Mr. Cinq-Mars was inconsistent in his positions, and he tried to rationalize his positions after the fact. In his testimony, Mr. Cinq-Mars made a great deal in respect of his November 20, 1978, (Exhibit # 14) criticisms in Mr. Iancu's evaluation, yet indicated on the form itself that he would favourably recommend Mr. Iancu for a permanent certificate.

> Q. All Right. Is there anything here then, that would cause the teacher to think that his future or his teaching position was in considerable difficulty or would be in difficulty if he didn't change?
>
> A. Yes.
>
> Q. What?
>
> A. The use of sarcasm; the inability to relate to level 4 students; the rapid pace which contributes to the inability to relate to the students.
>
> Q. All of those things should have told Mr. Iancu, if he didn't improve those, he would be in serious trouble?
>
> A. It certainly should hbe alerted him that there was a problem.
>
> THE CHAIRMAN: Well, Mr. Cinq-Mars, I think the question is this, that obviously those comments and indeed the evaluations or suggestions that there can be improvements..
>
> THE WITNESS: Yes.
>
> THE CHAIRMAN: And you are making criticism and offering constructive suggestions...
>
> THE WITNESS: Well I am trying to get that across.

THE CHAIRMAN: Well I understand what you are trying to do, but in terms of the overall cumulative position at this point in time, I think Ms. Minor is saying, was not your overall evaluation, that if you had to decide at this point in time he would have received a permanent contract and permanent certificate?

THE WITNESS: Yes.

THE CHAIRMAN: And let's say he continued on a plateau in terms of the performance, at this point in time, with a similar performance, then clearly he would have received his permanent certificate?

THE WITNESS: No. If he did not improve on those, which he clearly did not, which proved out later on...

THE CHAIRMAN: Well then, I mean to a lay person coming to this and looking at your ticks on the bottom "permanent contract: and "permanent certificate", are you suggesting that that was on the one day's performance?

I mean the inference from that is that cumulative to this point in time your evaluation is that here is a person that will receive his permanent contract and permanent certificate.

THE WITNESS: That is correct.

THE CHAIRMAN: He certainly can improve, but he is over the threshold; he meets the standards.

THE WITNESS: That is correct.

THE CHAIRMAN: Well, let's say he didn't improve at all, all right, for the balance of the year, but he maintained on a plateau of what you have got here,...

THE WITNESS: Right.

THE CHAIRMAN: ...would he not have received his permanent contract and permanent certificate?

THE WITNESS: I would have had some very difficult....a very strong difficulty with "permanent contract". "Permanent certificate", is something else again.

A permanent certificate is for some other Board. We are talking whether he is good enough for our Board.

THE CHAIRMAN: Well, all I am saying is, at least offhand, it strikes me that the literal reading of this seems to be very misleading to the uniformed person,perhaps even the teacher receiving it, but at least to the uninformed person because what you are saying now is that he was not up to the threshold; he was not up to the standards, at least for your Board's standards and therefore, would not have got a permanent contract on his performance to this point in time, even though you are ticking off "permanent contract" down below, and I must say, I just can't understan that.

THE WITNESS: I have no other explanation except that I do, principals as a rule do, everything possible to encourage new teachers or at least probationary teachers to feel secure.

THE CHAIRMAN: Well, I can understand that. I think anyone can understand that, but what you are essentially saying is, it seems, and you correct me if I am wrong here, but you are essentially saying that you are encouraging him to feel secure, but in fact, in your own mind he wasn't up to the standards of your Board at that point in time and leaving aside, whether it was intentional or unintentional or well-meaning or otherwise, ...I mean, he would be not receiving the same...you know, you would not be communicating effectively to him what his problem was at that point in time, would you?

You say he is not up to the standards and yet you are trying to encourage him to feel secure by creating the impression that he is up to the standards.

THE WITNESS: Yes.

THE CHAIRMAN: And, I mean that is just fraught with problems, it seems to me.

THE WITNESS: Yes, I understand that. I can see that. (Evidence,vol. pp. 68-72).

Mr. Cinq-Mars was inconsistent in his evaluations.

THE CHAIRMAN: Well there is no question you are being questioned on it. But I guess what I am wondering is, why, in terms of the relationship question, you would put down a very good rating on a basis of a one day performance? I mean, again, in terms of the impact of the evaluation upon the teacher or upon anyone else...well, I appreciate you weren't thinking of anyone else, at that point in time, why would you put anything down there if you are just talking about a one day evaluation, and especially if the one day evaluation doesn't accord with what is generally happening?

THE WITNESS: There is no good answer to that, I can't answer that in any way that is satisfactory, except to say, what I just said that I wished to give Mr. Iancu every consideration possible.

THE CHAIRMAN: Well could it have been that you were hearing some things about the teacher that were negative and you had some concerns, but you had very little or no firsthand knowledge, except what you had seen in the classroom. On November 20th, you had seen some sign of sarcasm that gave you a concern; on December 6th, you were quite happy with it so that on balance, could it have been that on balance you were prepared on December 6th to take his view of the relationship, overall, as being a positive relationship with the students?

THE WITNESS: I can agree with that, provided I can still maintain that deep in my inner core, my professional inner core, I still had the concerns of the students dropping out and the students complaints against Mr. Iancu, yes.

THE CHAIRMAN: Well, I guess, why I am asking that is where you are saying, when you said, "Very Good",under Box 11, on the December 6th one...

THE WITNESS: Right.

THE CHAIRMAN: ..for Teacher-Student Relationships, 'all right, Mr. Iancu', you know, 'there are some concerns out there but on balance, I am prepared to say or give you the benefit of the doubt that it is a positive relationship over the term, up to that point in time?

THE WITNESS: No. No. That was not in my mind at the time.

THE CHAIRMAN: You are saying you just ticked that off on the basis of one class...

THE WITNESS: Yes.

THE CHAIRMAN: And yet the November 20th one was not on one class?

THE WITNESS: That is right. And neither was the February 7th one...

THE CHAIRMAN: I mean, it is a very inconsistent way of evaluating, at the least.

THE WITNESS: Yes, I know. I understand that. I can only say that I wish I hadn't. (Evidence, vol. V, pp. 133-135).

Mr. Cinq-Mars was cross-examined as to his favourable evaluation of December 6, 1978.

Q. Well you did one evaluation in February after that, but I am talking now about December, okay?

He appears to have made some improvement from the last time you evaluated him, is that right?

A. Tremendous improvement.

Q. All right. And how do you explain that?

A. I don't know. It certainly was incompatible if we take a look at all of the evaluation reports that I gave him from November to March the 13th...

Q. Well, what if we don't. What if we take into account all the evaluation reports he received in '77/'78, yours of November 20th; the next two of Bourgeois and Gardhouse and then this one, would you say that it is consistent?

A. The only inconsistent report in the reports I made, is this one.

Q. I am not asking you about your reports, Mr. Cinq-Mars. I just asked you, we have got a year of Beatty reports; we have got your report, to date we have got a Bourgeois report, a Gardhouse report and a third Cinq-Mars' report. Now which one is the one that is inconsistent, if any?

A. Well my November 20th report is inconsistent.

Q. So you say your report is more 'negative' is that right?

A. My November report definitely shows some concerns, yes.

Q. Well, I am asking you, if you meant, your November report to be more negative than the other three we have now looked at, including yours?

A. If I meant it when I was writing it out?

Q. Yes. I disagree with you as to how negative that is, but you have told us you meant it to be negative, is that right? I don't want to put words in your mouth?

A. I think you just did.

Q. Well all right. If yours consistent with those to date or inconsistent?

A. It is inconsistent, in the fact that, mine does show some concerns, which I considered serious.

Q. All right. So to that extent it is more negative, is that right?

A. Yes. (Evidence, vol. V, pp. 110-112).

He also testified that he received visits from students and calls from parents in December, 1978, and January, 1979, "about inconsistent markings, sarcasm, demeaning remarks. The teacher was superior to his students, exhibited superior behaviour to the students" but those problems appeared to be later resolved in so far as the parents were concerned. (Evidence, vol V., pp. 121-123).

He did receive a visit from Anne DesRoches and Marnie Ridiout complaining about the problems they confronted in Mr. Iancu with respect to the rehearsal of the play. (Evidence, vol. V, p. 160).

It is clear there was never a written, significantly negative, evaluation of Mr. Iancu as a teacher that was physically in the hands of Mr. Iancu before the communication to him by Mr. Cinq-Mars on March 1, 1979, that his contract was being terminated. Mr. Cinq-Mars knew on that date that Mr. Iancu did not yet have the February 7 evaluation - this is clear from the notation dated March 9 by Mr. Cinq-Mars himself on the face of the document (Exhibit, #18) itself. Mr. Cinq-Mars himself said in cross-examination that he did not inform Mr. Iancu until March 1, when Mr. Cinq-Mars had made up his mind to terminate, that Mr. Iancu was in jeopardy.

"Q. Okay. Did you express to Mr. Iancu at that time, if he didn't improve, he might face very serious consequences at the end, namely, not being recommended for permanent...

THE CHAIRMAN: Is this February 7th?

MS. MINOR: Yes.

BY MS. MINOR:

Q. ...not being recommended for permanent certificate or not having his contract renewed?

A. No, I don't think so, but I certainly left them off the evaluation report.

Q. I take it that was becoming more likely, in your mind, is that right?

A. Yes.

Q. Do you think it might have been more effective to tell him, at that point, that he was in jeopardy, to convey the degree of severity of the problem?

A. I don't know. I informed him on March the 1st in order to help him plan his life and look what happened; so I don't know.

A. I don't know. I informed him on March the 1st in order to help him plan his life and look what happened; so I don't know.

Q. I don't think you told him he was in jeopardy on March the 1st; I think you told him you had made up your mind on March the 1st.

Mr. Cinq-Mars did indeed lack in "skills in dealing with people" (Evidence , vol. 11, p. 239). Although Mr. Iancu was in a most unusual, exceptional and extraordinary position as a probationary teacher as of the end of February, 1979, given the principal's views as to Mr. Iancu's deteriorating position, he should have been effectively warned and given the opportunity over some reasonable period of time to correct the problems. Mr. Cinq-Mars did not effectively comply with the established practice of the Board as to the giving of a reasonable warning and a reasonable time to rectify the problem.[1] Yet, it very probably meant the end of Mr. Iancu's teaching career in Ontario, if he did not receive permanent status, and this was known to Mr. Cinq-Mars.

Mr. Iancu had extraordinary ability and talents, if they were marred by serious problems in teaching. Yet Mr. Iancu's problem was not one of lack of motivation. True, he had failed to improve in his shortcomings as a teacher, which he himself knew about (from Mr. Quilty, Mr. Beatty, and the students themselves given the very obvious drop-out problem, and to some extent from Mr. Cinq-Mars' November evaluation) yet he had no reasonable notice of the seriousness of these shortcomings from the standpoint of his achieving permanent status. Mr. Iancu had his own, quite demanding, academic standards and he just did not realize the degree of the problems caused by his own personality and style.

Mr. Cinq-Mars did not communicate effectively with Mr. Iancu at the March 1, 1979, meeting. On the other hand, Mr. Iancu made inferences as to discrimination from this meeting, which inferences were unfounded. Mr. Iancu inferred far too much from Mr. Cinq-Mars' too vague communications. Mrs. Iancu's recollection of the conversation probably came the closest as to what was really stated.

Nor did Mr. Cinq-Mars consult with anyone else about the termination of Mr. Iancu. I realize that it would be unusual to do so, but Mr. Cinq-Mars was faced wtih both a very unusual situation and an unusual individual in Mr. Iancu.

Mr. M. A. Albert, vice-principal of PSS, testified that Mr. Beatty had indicated to Mr. Albert at the end of the 1978-79 school year that Mr. Iancu had not met his expectations, but that Mrs. Iancu had. However, Mr. Albert did not sense any danger of Mr. Iancu not receiving his permanent certificate. (Evidence, vol. II, pp. 177, 178). Mr. Albert said that he did not know in advance of the dismissal of Mr. Iancu, nor was the matter ever discussed with him by the principal, and he himself was surprised about the non-renewal of Mr. Iancu's contract. (Evidence, vol. II, pp. 192 - 194, 196 - 199).

Superintendent Beatty, Mr. Iancu's former principal, was not consulted by Mr. Cinq-Mars before the termination of Mr. Iancu's employment, but had discussed all members of his staff with Mr. Cinq-Mars before leaving the principalship in the spring of 1978. (Evidence, vol. IV pp. 24, 25, 115; vol. III, pp. 10, 11).

Nor was Mr. Iancu's Department Head, Mr. Quilty, asked specifically on the question of termination, before Mr. Cinq-Mars made his decision (Evidence, vol. V, pp. 23, 26). However, Mr. Quilty stated that in the fall of 1978, he would have been "very hesitant to recommend him for permanent certificate". (Evidence, vol. V, p. 92). Nor did Mr. Cinq-Mars consult with Mr. Bourgeois before making his decision to terminate (Evidence, vol. I, pp. 149, 178).

Given the suddenness of the change to his position in achieving permanent status, given the previous favourable evaluations he had received, given the general background pressures and debate within the community on the issue of a unilingual french school (and as sometimes exemplified in La Gout de Vie), given the specific comment of Mr. Bellehemeur toward the Iancus when they first arrived to the community, given the poor communication by Mr. Cinq-Mars on March 1, 1979, to Mr. and Mrs. Iancu as to the specific problems Mr. Iancu was encountering in his teaching, and given Mr. Iancu's own psychological need for rationalization as to what the problems really were at the point of a traumatic, unexpected termination, it is not all that surprising that Mr. Iancu would surmise, quite incorrectly, that he was being discriminated against because he was not a franco-Ontarien. But he also knew full well at all material times that he had serious problems with his teaching in terms of his relationship with his students. He tried to rationalize and minimize these problems in his testimony, but they were unquestionably the reason for his termination. Ultimately, he himself was responsible for his problem.

Mr. Bellehemeur, the then chairperson of FLAC, had spoken in a quite frank manner to the Iancus in the fall of 1977, about their not being franco-Ontariens, and this incident took on a central aspect of Mr. Iancu's feeling some twenty months later that pressure was being brought by some persons in the francophone community to terminate Mr. Iancu's teaching contract. However, it must be noted that it appears Mr. Bellehemeur had passed away by this time (Evidence, vol. III, p. 64). There was no evidence that any other FLAC member, or any other member of the franco-Ontarien community generally, had brought any pressure upon the Board or any of its employees to terminate Mr. Iancu's teaching contract and indeed, every witness testified that no one (other than Mr. Bellehumeur) had ever suggested this. All of the witnesses who were educators testified they had never heard complaints regarding Mr. Iancu in the community on the basis that he was not a franco-Ontarien (for example, Mr. Quilty - Evidence, vol. V, p. 25; Mr. Paille, vol. VII, p. 69). I was particularly impressed by the evidence of Mr. Harris, Mr. Beatty and Mr. Quilty, all of whom were quite straightforward in their testimony. All three were open and truthful in their testimony and tried to be as fair as they possibly could be to the Complainant in recollecting events. I have no doubts in accepting their evidence.

As well, Mr. Cinq-Mars testified that FLAC "never ... made any direct remarks aimed at any one particular teacher". (Evidence, vol. V, p. 19). Mr. Cinq-Mars' relationship with FLAC was described by Mr. Beatty as "cool" (Evidence, vol IV, p. 26). Whatever Mr. Cinq-Mars' shortcomings were in dealing with Mr. Iancu and I think they were several, Mr. Cinq-Mars, on all the evidence, impressed me as someone who would stand up forcefully to any pressures from FLAC, if such pressures had in fact been

there. However, on all the evidence, I do not think there really were any pressures from FLAC or the general franco-Ontarien community as such to terminate Mr. Iancu's contract. It is helpful also to point out some other incidental facts as presented in the evidence.

Mrs. Iancu, a non-franco-Ontarien, was promoted to be department head after her first year of teaching, replacing someone who had been very active in the franco-Ontarien community. Mr. Beatty testified that no pressure was put upon him from FLAC at any time in respect of Mrs. Iancu's promotion to this position. Although Mrs. Iancu was not a Franco-Ontarien, at least one other competing candidate was. (Evidencem vol. IV, p. 125).

A Mr. Axel Brosi, a non-franco-Ontarien was hired after Mr. Iancu's termination, to teach georgraphie (Evidence, vol. V, p. 255; vol. VII, p. 297). Mrs. Marie-Yvette Genevieve Roy-Manshat testified that Le Caron opened with two non-franco-Ontarien, non-French Canadian members of staff, out of ten (Evidence, vol. VII, p. 284).

Thus, while I find on the evidence that there was no discrimination of the Complainant in breach of the Code, we are left with the human tragedy arising from a most unfortunate course of events, from which neither Mr. Iancu nor his principal, Mr. Cinq-Mars, emerges unblemished.

Given the unquestioned capacity of Arny Iancu, albeit now with a somewhat tarnished promise as a teacher as of March, 1979, coupled with the extraordinary situation (generally favourable evaluations, but with a drop-out problem due to a personality approach on the part of the teacher

(but coupled with his continuing motivation to try to be a good teacher of children) the fair and sensible approach would have been to extend the probationary period for another year, if that was legally possible (if the problems could have been overcome I am certain Mr. Iancu would have become an excellent teacher and thus, significant asset to the Board).

Section 8 of the probationary teacher's contract provides that if it is not terminated at the conclusion of the probationary period then the teacher is "deemed to be employed as a permanent teacher" (Exhibit #25). The position of the Board seems to have been that, therefore, it could not extend the probationary period, (Evidence, vol. II, pp. 108, 109), however, perhaps the parties could have mutually agreed to modify the contract by extending the probationary period (in section #1), or alternatively, mutually agreed to terminate the existing contract (section #6(a)) and enter into a new probationary contract. That is, was the contract in the particular situation capable of modification by agreement just like any ordinary contract?

Perhaps provisions of the Education Act would preclude such a modification to the original contract. I have not considered this question at all as it is irrelevant to the Inquiry. It is enough to say that the possibility of an extended probationary period was not considered at all by principal Cinq-Mars, so that no opinion was sought from the Board by him, or in turn by the Board from its solicitors if there was doubt on the point.

Therefore, for the reasons set forth, the Complaint is dismissed.

Referring back to the legal framework I set forth at the very beginning of these reasons for decision, I find, considering all the evidence, that a prohibited ground was not the proximate cause of dismissal. Indeed, no motive based upon a prohibited ground was at all present in respect of the dismissal. However, from simply an employer-employee relations standpoint, and from the standpoint of simple fairness, the process of reaching the decision for dismissal of Mr. Iancu by the principal left a good deal to be desired.

I mention by way of obiter dicta that pursuant to my analysis of the law, the Respondent school board could have been found liable for the unlawful discrimination of the school principal (if I had found unlawful discrimination on the evidence) because the school principal is, in my view, part of the management or "directing mind" of the school board. The school board would be personally in breach of the Code if its school principal had been in breach of the Code and the breach arose in the course of his acting as agent for the corporation in the carrying on of its business (hypothetical situations #4 and #5 at pages 38 and 39 supra). A breach of the Code is attributable to the corporate entity, the school board, as an extension of those running the school board's affairs. The school principal is not a mere servant of the school board.

In my opinion, the organic theory of corporate responsibility applies in respect of breaches of the Code. The school board would also have been liable due to the act of its agent, the school principal, in causing a breach of contract between the school board and the teacher (hypothetical situation #6 at page 39, supra.)

I might add in conclusion that both Counsel for the parties did a most excellent job in dealing with the complex history of the events in question. The Complaint itself, and evidence given on behalf of the Complainant, certainly suggested a prima facie case of discrimination and it was only after the consideration of the entirety of the considerable evidence given before the Inquiry that it could be determined that there was no breach of the Code. However, after hearing all of the evidence, I have no doubt in concluding that there was not a breach of the Code.

Dated at Toronto, this 3rd day of January, 1983.

Peter A. Cumming